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EMPLOYERS' LIABILITY

UNDER THE
WORKMEN'S COMPENSATION ACT, 1897,
AND THE
EMPLOYERS' LIABILITY ACT, 1880.

BY

ARTHUR ROBINSON, B.A.,

BARRISTER-AT-LAW

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Author of " The Law Relating to Income Tax."*

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PREFACE.

IN this little book the author has attempted to deal with the liability of employers under the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1897. The book commences with a short summary of the law, then follow the two Acts, which are dealt with section by section, and the conclusion is devoted to the common law defences to actions under the Employers' Liability Act. It is hoped that this arrangement will prove useful.

December, 1897.

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EMPLOYERS' LIABILITY.

SUMMARY OF THE LAW.

It is hardly necessary to remark that a great change in the Law of Employers' Liability has been effected by the Workmen's Compensation Act, 1897.

At common law, the position of a workman who had suffered personal injuries was *inferior* to that of a stranger. Not only was every defence that could be used against a stranger open to the employer, but, in addition, where the injury to the workman was caused by the negligence of a fellow-servant, the employer could raise the defence of "common employment," since the workman, in engaging in the employment, was considered to have accepted this kind of risk.

Liability
of the
employer
at com-
mon law :

The Employers' Liability Act, 1880, was directed solely against the defence of "common employment." The effect of this Act, in actions which come within its sphere, is to place the workman *in the same position* as that of a stranger.

—under
the Em-
ployers'
Liability
Act, 1880
(43 & 44
Vict.c.42):

Far different is the effect of the Workmen's Compensation Act, 1897. This Act, in those employments to which it applies, places the workman in a *far superior position* to that of a stranger. It practically makes the employer liable for all accidents.

—under
the Work-
men's
Compensa-
tion Act,
1897 (60 &
61 Vict.
c. 37).

It is intended that, in such employments, payment of compensation to workmen for accidents shall be part of the cost of carrying on the trade. This, in England, is a new principle, and it remains to be seen how far it will ultimately affect the wages of the workmen. The fact that, in these employments, no less than three of the principal defences which, in the past, employers have used against their workmen, have been completely swept away, shows how great an alteration has been made in the law.

These defences were :—

- (a) That the injury arose from a risk to which the workman exposed himself with knowledge and of his own free will. “*Volenti non fit injuria.*”
- (b) Inevitable accident, including all cases where the workman failed to prove negligence.
- (c) Contributory negligence of the workman.

It is still a defence if it is proved that the injury is attributable to the serious and wilful misconduct of the workman, but this can hardly be said to preserve any of the doctrine of contributory negligence.

From a legal point of view, perhaps, the alteration under (b) is the most remarkable. It introduces a new principle of liability into the law of torts, making the employer liable where there is no negligence on his part or on that of his servants.

We must now turn our attention to some of the principal provisions of the Workmen's Compensation Act, 1897.

Consideration of the principal provisions of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37).

Sect. 1 provides that if, in any employment to which the Act applies, personal injury, disabling a workman for at least two weeks, is caused to him

by accident arising out of, and in the course of, the employment, the employer is to pay compensation.

Sect. 1.
The liability.

Sect. 7 gives the employments, which are as follows:—on or in or about a railway, factory, mine, quarry, or engineering work, or on, in or about a building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof.

Sect. 7.
The employments.

The First Schedule to the Act gives the compensation, which is not to exceed 300% in case of death, or 1% per week in case of disablement.

First Schedule,
the compensation.

Sect. 1 (2) (b) provides that where the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, the workman has an option either to proceed under the new Act or under the law as it existed before the Act. In other cases, the workman can only take proceedings under the new Act.

Sect. 1.
Option to workman where injury caused by personal negligence or wilful act. Otherwise no option.

Sect. 1 (4) provides that if a workman brings an action independently of the Act, and it is determined that the injury is one for which the employer is not liable apart from the Act, but that he would have been liable to pay compensation under the Act, the workman, if he choose, may have the compensation assessed under the provisions of the Act.

Option to workman who has taken the wrong proceedings.

Sect. 1 (2) (c) provides that compensation shall not be allowed where the injury is attributable to the serious and wilful misconduct of the workman.

Serious and wilful misconduct of workman.

Arbitra-
tion.

Sect. 1 (3) provides for the settlement by arbitration of questions as to whether the employment is one to which the Act applies, and also as to the amount or duration of the compensation.

Second
Schedule.

The procedure in such arbitration is given in the Second Schedule to the Act.

Sect. 2.
Notice of
accident.

Sect. 2 deals with the notice of accident and the time for claiming compensation.

The notice of accident is to be given as soon as practicable after the happening thereof. The want of, or defect, or inaccuracy in the notice of accident is not to be a bar to the proceedings if it is found that the employer is not prejudiced in his defence, or that the want, defect, or inaccuracy "was occasioned by mistake or other reasonable cause."

Time for
taking
proceed-
ings.

The claim for compensation must be made within six months of the accident.

Sect. 3.
Contract-
ing out.

Sect. 3 provides that workmen may contract themselves out of the Act if the contract provides a scheme of compensation which the Registrar of Friendly Societies certifies is on the whole not less favourable to the workmen than the Act. (a)

Sect. 4.
Sub-con-
tractors.

Sect. 4 provides that the employer shall be liable to the workmen of sub-contractors, unless the work is merely ancillary or incidental to, and is no part of, or process in, the trade or business of the employer.

Sect. 5.
Bank-
ruptcy of
employer.

Sect. 5 provides that the workmen shall, in case of the bankruptcy of the employer, have a first charge on any sum to which the latter is entitled from insurers in respect of his liabilities under the Act.

Sect. 6.
Stranger
liable.

Sect. 6 provides that where a stranger is liable apart from the Act the workman may proceed either

(a) See Appendix D, p. 113.

against him or against the employer, and in the latter case the employer is entitled to be indemnified by the stranger.

Having now considered the principal provisions of this remarkable Act, we propose to show more exactly how the old common law defences of the employer have been modified or done away with.

A consideration of the defences open to the employer.

To an ordinary action at common law brought by A. against B. for damages for personal injuries received by A. through the negligence of B. or his servants, the following would be the usual defences:—

1. That the injury arose from a risk to which A. exposed himself with knowledge and of his own free will, *i. e.*, that the doctrine of "*volenti non fit injuria*" applied.
2. That the injury arose from inevitable accident (including all cases where A. failed to prove negligence).
3. That A. was guilty of contributory negligence.
4. That A. was a trespasser or bare licensee.
5. In cases where A. alleged that the injury arose from the negligence of a servant of B., for which B. was liable by reason of the doctrine of "*respondet superior*," that that doctrine did not apply because—
 - (a) The negligent act was not within the scope of the servant's employment.
 - (b) The servant was not the servant of B. at the time of the accident.

But when A. was a servant of B., there was yet another defence open to B., which also prevented the doctrine of "*respondet superior*" from applying.

A consideration of the defences open to the employer.

This was—

- (c) That A. and the servant of B. by whose negligence the injury was caused were fellow-servants of B., which was technically described as being “in common employment.”

It is not necessary to analyse the theory of “common employment,” but the words have a very comprehensive meaning. It has been held that an ordinary seaman is in “common employment” with a chief engineer (*a*), a guard of a train with a “ganger” of platelayers (*b*), a bricklayer with his foreman (*c*), and a manager of a mine with a miner (*d*).

The defence of common employment was a complete answer to the plaintiff’s claim if the employer had taken reasonable care to employ competent workmen (*e*).

As we have already said, the effect of the Employers’ Liability Act, 1880, was, in actions brought under its provisions, to take away from B. the defence of “common employment.” The other defences we have mentioned were left untouched.

Now let us consider the effect of the Workmen’s Compensation Act, 1897, when the workman is in one of those employments to which it applies.

(*a*) 1861, *Searle v. Lindsay*, 31 L. J., C. P. 106.

(*b*) 1863, *Waller v. S. E. R.*, 2 H. & C. 102; 32 L. J., Ex. 205.

(*c*) 1850, *Wigmore v. Jay*, 5 Ex. 354; 19 L. J., Ex. 300.

(*d*) 1874, *Howells v. Landore Steel Co.*, L. R., 10 Q. B. 62; 44 L. J., Q. B. 25.

(*e*) 1873, *Balleny v. Cree*, 11 Sc. Ses. Cas., 3rd Series, 626.

Turning to the old defences—

1. The defence of “*volenti non fit injuria*” is gone.
2. The defence of “inevitable accident” (including all cases where A. failed to prove negligence) is gone.
3. The defence of contributory negligence is gone. There remains only the defence that the injury was due to the serious and wilful misconduct of A.
4. The defence that A. was a trespasser or bare licensee is not likely to arise in cases to which the Workmen’s Compensation Act applies for the same reason that it seldom arises under the Employers’ Liability Act, 1880. This is not because the defence is taken away by the Act, but because the workman of an employer cannot well be a trespasser or bare licensee.
5. In cases where the injury is alleged to arise from the negligent act of B.’s servant—
 - (a) The defence that the negligent act was not within the scope of the servant’s employment is gone, unless it reappears under the form that the accident did not arise out of and in the course of the employment (*a*).
 - (b) The defence that the servant was not the servant of B. at the time of the accident is partially destroyed.

A consideration of the defences open to the employer.

(a) See sect. 1, *post*, p. 13.

A consideration of the defences open to the employer.

This defence usually takes one of two forms (*a*).

Either—

- (i) That the servant was a sub-contractor, or the servant of a sub-contractor, employed by B.
- (ii) That at the time of the accident B. had lent the servant to some other person.

The defence (i) only remains where the work contracted for is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by B. (*b*).

The defence (ii) will hardly occur in cases to which the Act applies, as the accident must arise out of and in the course of the employment, and this will be the sole test of liability.

The following Table will show the position at a glance:—

[TABLE

(*a*) See *post*, pp. 91, 93.

(*b*) See sect. 4, *post*, p. 21.

ACTION BROUGHT BY A., A SERVANT OF B., AGAINST B. FOR
DAMAGES FOR PERSONAL INJURIES.

<i>Defences at Common Law.</i>	<i>Defences under the Employers' Liability Act, 1880.</i>	<i>Defences under the Workmen's Compensation Act, 1897.</i>
1. <i>Volenti non fit injuria.</i>	1. <i>Volenti non fit injuria.</i>	
2. Inevitable accident (including all cases where A. fails to prove negligence).	2. Inevitable accident (including all cases where A. fails to prove negligence).	
3. Contributory negligence.	3. Contributory negligence.	1. Injury due to serious and wilful misconduct of A.
4. A., a trespasser, or bare licensee.	4. A., a trespasser, or bare licensee (unlikely to arise, because included in 7 of this column).	2. A., a trespasser, or bare licensee (unlikely to arise, because included in 5 of this column).
5 (a) Injury from negligence of servant of B. outside the scope of his employment.	5 (a) Same as at common law.	3 (a) The question of scope of employment, so far as it can arise, will fall under 5 of this column.
(b) Injury from negligence of person not the servant of B.	(b) Do.	(b) That the alleged negligent servant was a sub-contractor, or the servant of a sub-contractor, of B., and that the work contracted for was merely ancillary to, and no part of or process in, the trade or business of B.
6. Common employment.	6. That A. has contracted out. 7. That the action is not brought under the provisions of the Act.	4. That A. has contracted out. 5. That the action is not brought under the provisions of the Act.

NOTE.—Where the action fails at common law, or under the Employers' Liability Act, 1880, but the plaintiff would have been entitled under the Workmen's Compensation Act, 1897, he may elect to have the compensation assessed. (See sect. 1 (4).)

Defences
under
the Em-
ployers'
Liability
Act, 1880.

With regard to the defences that arise on the question as to whether the action is brought under the provisions of the Employers' Liability Act, 1880, we shall deal with these when we come to the consideration of the Act itself, and the numerous cases which have arisen thereunder.

Defences
under the
Work-
men's
Compensa-
tion Act.

With regard to the like defences under the Workmen's Compensation Act, 1897, the following are the most obvious defences:—

1. That the "employment" is not within the Act. Sect. 1 and sect. 7 (1).
2. That the plaintiff was not a workman. Sect. 1 and sect. 7.
3. That the accident did not arise out of and in the course of the employment. Sect. 1.
4. That the workman was not disabled for two weeks. Sect. 1 (2).
5. That the proceedings are barred by the absence of, or defect in, the notice of injury. Sect. 2 (1).
6. That the claim for compensation has not been made within six months from the occurrence of the accident. Sect. 2 (1).

Damages
recover-
able.

We shall conclude with a Table showing the damages recoverable at common law under the Employers' Liability Act, 1880, and under the Workmen's Compensation Act, 1897.

[TABLE

COMPENSATION OR DAMAGES RECOVERABLE.

<i>At Common Law.</i>	<i>Under the Employers' Liability Act, 1880.</i>	<i>Under the Workmen's Compensation Act, 1897.</i>
(a) In case of death : Action under Lord Campbell's Act for the benefit of wife, husband, parent, and child. Damages limited to pecuniary loss. (b) In case of injury : Unlimited.	As at common law, with the further limitation that the damages shall not exceed a sum equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade.	(a) In case of death : i. Where the workman leaves dependants wholly dependent upon him, a sum equal to his earnings in the employment during the past three years, or 150<i>l.</i>, whichever is greater, but not exceeding 300<i>l.</i> If the period of employment has been less than three years, his earnings to be reckoned at 156 times his average weekly earnings. ii. Where the workman leaves dependants partially dependent upon him, a sum (not to exceed the amount under i.) to be settled by agreement or arbitration. iii. Where the workman leaves no dependants, the expenses of medical attendance and burial, not to exceed 10<i>l.</i> (b) In case of total or partial incapacity : During incapacity, after the second week thereof, a weekly sum not exceeding 50 per cent. of his average weekly earnings during the past year, or so long as he has been employed, such weekly payment not to exceed 1<i>l.</i>

THE WORKMEN'S COMPENSATION ACT, 1897.

(60 & 61 VICT. c. 37.)

*An Act to amend the Law with respect to
Compensation to Workmen for Accidental
Injuries suffered in the course of their
Employment.*

BE IT ENACTED by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) If in any employment⁽¹⁾ to which this Act applies personal injury by accident⁽²⁾ arising out of and in the course of the employment⁽³⁾ is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.

Liability
of certain
employers
to work-
men for
injuries.

(1) The employments are specified in sect. 7 (1).

(2) This wide term will include “inevitable accident” and “act of God.”

(3) These words, “arising out of and in the course of the employment,” are most important, as they form almost the sole limitation imposed by the Act as to the nature of the “accidents” for which the employer is responsible.

(2.) Provided that—

(a) The employer shall not be liable under this Act in respect of any injury which does not

Disable-
ment must
exceed two
weeks in
duration.

60 & 61
 Vict. c. 37,
 s. 1 (2) (a).

disable the workman for a period of at least two weeks ⁽¹⁾ from earning full wages at the work at which he was employed :

(¹) In explaining the introduction of these words, Mr. Chamberlain said :—

The reason why the limit of two weeks was introduced was this. The Bill applied a new principle to industry, and threw a new burden on employers and on the trades they represented independent altogether of any negligence or action attributed to the employers themselves. This new principle the Government would only be justified in applying by some great public human interest. Now that great public human interest arose in the case of what he might call serious accidents. The sufferers from those accidents were the wounded soldiers of industry whom they had in their minds, and about whom so much was said in discussing this subject—people who were seriously if not permanently injured, and prevented, at all events for a considerable period, from following their ordinary employment. There would be no ground for legislative interference if they could believe that every accident which occurred was an accident whose effects would not last longer than three weeks. Such accidents as these were accidents for which the workman might properly be expected to make provision himself.

Injury
 caused by
 personal
 negligence
 or wilful
 act.

(b) When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceeding

independently of this Act, except in case of such personal negligence or wilful act as aforesaid : 60 & 61
Vict. c. 37,
s. 1 (2) (b).

In explaining this clause, Mr. Chamberlain said :—

They always intended that questions affecting the personal negligence of the employer should be dealt with by alternative methods. It was perfectly true that the essence of the Bill was, with regard to the vast proportion of the accidents which would come under it, that there should be no choice for either the workman or employer but to take their position under the Bill. But they always made an exception in the cases in which it was alleged that the accident was due to the personal negligence of the employer. Those were a very small proportion of the accidents, but as to that proportion, they did intend that the rights of the workman should remain absolutely unimpaired. He was not only to have this new option of taking his position, without discussion, under the Bill, but he would have, if he preferred it, any of the other rights which he would have now under the Employers' Liability Act, Lord Campbell's Act, or the common law.

Under the law as it existed before the present Act, the employer was only liable for the wilful act of his servant when done in the course of the servant's employment on the employer's behalf, and with the intention of serving his purposes. The employer was not liable for the wilful act of his servant when that act was done in order to effect some purpose of the servant's. See, on the one hand, 1862, *Limpus v. London General Omnibus Co.* (1 H. & C. 526), in which the defendants were held liable for the act of their driver in pulling their omnibus across the road in front of the plaintiff's omnibus, although the driver had printed instructions not to race with or obstruct other omnibuses; and, on the other hand, 1821, *Croft v. Alison* (4 B. & Ald. 590), in which it was held, that where the servant wantonly, and not in order to execute his master's orders, strikes the plaintiff's horses, and thereby produces the accident, his master is not liable. If the workman chooses the old remedies, this question will, of course, be important, but if he chooses the new remedy, the sole question will be, whether the accident arose out of, and in the course of, his employment.

- (c.) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation Injury attributable to serious and wilful

60 & 61
Vict. c. 37,
s. 1 (2) (c).

miscon-
duct of
workman.

claimed in respect of that injury shall be dis-
allowed.

The object of this sub-section is to prevent the workman from recovering in cases where the accident is caused by his own gross negligence without introducing the doctrine of contributory negligence. When the Bill went to the House of Lords, the words were "solely attributable." The House of Lords struck out the word "solely," and the amendment was accepted by the House of Commons. The following passage from Mr. Chamberlain's speech on the consideration of the Lords' amendment is very instructive:—

The word "solely" was not, it is true, introduced in the early discussions of this amendment. In the first instance there was no reference to the case of "gross and wilful negligence" of the workmen, but it was admitted not merely by the employers but also by representatives of the workmen that it would be a monstrous thing to compensate a workman whose wilful and gross fault had brought on himself and others serious injury. To do so was really to take away one of the causes which might lead to the prevention of accidents—almost to induce accidents instead of to prevent them. In the attempt to deal with this matter, which I admit is a very complicated one, we tried one form of words after another; but we have never been able to please the hon. member. In the first instance, the proposal was that wherever an accident was due to the wilful breach of rules and regulations, or drunkenness, or gross misconduct—in all these cases the workman was not to receive compensation. The word "solely" was not introduced then; it was where the accident was attributable to those causes that the word "solely" was introduced. That was objected to, because it was pointed out that it might go too far, and rules might be made a breach of which might not constitute wilful and serious negligence. On the other hand, it was argued that where a rule was made in order to secure the safety of the workmen and the accident was due to a breach of such rule, then it ought to hold as gross and wilful negligence. We agreed to that argument, and we took out those specific words, and we left the provision in the form in which it has been amended by the other House. In the other House it was pointed out that that would clearly lead to injustice, and I do not think it can be denied even by the hon. member. If you say you must prove that the accident is "solely" attributable, probably you will never be able to prove it, although there might have been much gross and wilful negligence. I am sure that hon. members would not pretend that a

workman in such circumstances is entitled to compensation, yet you could not say that the accident was "solely" attributable to any one cause, because an accident almost invariably is connected with more than one cause, and "solely" would bar all these cases. I will give one case. Suppose an accident were due, using the words here, to "serious and wilful misconduct" of two workmen engaged in the same operation. Then, as it would not be "solely attributable" to the action of either, for both of these men were guilty, it is doubtful whether they would come in for compensation. There is evidently a blot in our work, and although it is true we gave serious consideration to the matter before proposing the provisions, yet when it was pointed out that a construction of this kind would be unfair and unjust, we thought it would be right to accept or to consider an amendment to remove that injustice. As the section will stand with the amendment of the other House, I do not think it makes a great difference. It takes a very great lawyer to see the exact difference between "attributable" and "solely attributable." The only fear is whether by the word "solely" we should let in the doctrine of contributory negligence, which we expressed our desire to exclude. I do not think it would be the case.

60 & 61
Vict. c. 37,
s. 1 (2) (c).

(3.) If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment ⁽¹⁾ is one to which this Act applies), or as to the amount ⁽²⁾ or duration ⁽²⁾ of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act.

(1) As defined by sect. 7 (1).

(2) See the First Schedule as to the amount and duration of compensation.

(4.) If, within the time ⁽¹⁾ hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the

Arbitra-
tion.

Mistake
as to pro-
ceedings.

60 & 61
Vict. c. 37,
s. 1 (4).

employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act.

In any proceeding under this sub-section, when the Court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act.

(1) The claim for compensation must be made within six months of the accident causing the injury, or, in case of death, within six months from the time of death. (See sect. 2 (1).)

(5) Nothing in this Act shall affect any proceeding for a fine under the enactments relating to mines or factories, or the application of any such fine, but if any such fine, or any part thereof, has been applied for the benefit of the person injured, the amount so applied shall be taken into account in estimating the compensation under this Act.

Time for
taking
proceed-
ings and
notice of
injury.

2. (a)—(1) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured (1), and

(a) See the corresponding sections in the Employers' Liability Act, *post*, pp. 61, 64.

unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in the case of death, within six months from the time of death. Provided always, that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause.

60 & 61
Vict. c. 37,
s. 2 (1).

This remarkable section is, as might be imagined, the effect of a compromise between conflicting interests in Parliament. It may be doubted whether the notice of accident will be any use at all, as to bar the proceedings the want, defect, or inaccuracy therein must not only prejudice the employer in his defence, but must not be due to mistake or other reasonable cause.

(¹)—**before the workman has voluntarily left the employment in which he was injured.** The object of these words is to prevent fictitious claims after the workman has left the employment, when it would be impossible for the employer to know whether the accident really happened during the time that the workman was in the employment.

(2) Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

Notice of
injury.

(3) The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

(4) The notice may also be served by post by a registered letter addressed to the person on whom it

60 & 61
 Vict. c. 37,
 s. 2 (4).

is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post; and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.

(5) Where the employer is a body of persons corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at, the office, or, if there be more than one office, any one of the offices of such body.

Contract-
 ing out.

3.—(1) If the registrar of friendly societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, is on the whole not less favourable to the general body of workmen and their dependants than the provisions of this Act, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this Act; and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act. (a)

(2) The registrar may give a certificate to expire at the end of a limited period not less than five years.

(3) No scheme shall be so certified which contains

(a) See Appendix D, p. 113.

an obligation upon the workmen to join the scheme as a condition of their hiring.

60 & 61
Vict. c. 37,
s. 3 (3).

(4) If complaint is made to the registrar of friendly societies by or on behalf of the workmen of any employer that the provisions of any scheme are no longer on the whole so favourable to the general body of workmen of such employer and their dependants as the provisions of this Act, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the registrar shall examine into the complaint, and, if satisfied that good cause exists for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5) When a certificate is revoked or expires any moneys or securities held for the purpose of the scheme shall be distributed as may be arranged between the employer and workmen, or as may be determined by the registrar of friendly societies in the event of a difference of opinion.

(6) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the registrar of friendly societies.

(7) The chief registrar of friendly societies shall include in his annual report the particulars of the proceedings of the registrar under this Act.

4. Where in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would,

Sub-con-
tracting.

60 & 61
 Vict. c. 37.
 s. 4.

Sub-con-
 tracting.

if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies.

Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section.

This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively.

This section was sent up by the Commons in a form that both parties in the Lords agreed was unintelligible. It was accordingly redrafted and introduced by Lord Selborne in its present form, but without the last clause. On its introduction Lord Selborne explained its object as follows:—

As a familiar and simple instance of sub-contracting he might mention that in a coal mine it was a common practice for a butty man to work with a gang of four or five men. The butty man was paid for the coal the gang produced by the coal owner, and he distributed among the gang the proceeds. If this clause were not inserted, in case of an accident the men hewing coal under the butty man would have no remedy except against the butty man. But as the amended clause stood, the remedy would be against the coal owner, the principle of the Bill being that all men engaged in such occupations should receive compensation, and not be deprived of it by a mere trade arrangement such as he had described.

LORD HERSCHELL pointed out that the clause would have a wider application than the noble earl imagined. The Bill imposed liability without regard to any conduct on the part of the person rendered liable in the public interest. He entertained a strong opinion that if this were done at all the State should bear the burden instead of its being cast on employers, to the certain dislocation of certain trades. He wished to put a case to which he understood the clause would apply. A mine owner employed a builder to build pit cottages at the mine or to do building works about the mine not involving houses 30ft. high; or a railway company employed a builder to do painting, plumbing, and other work at their stations. In such cases the effect of the clause would be to make the mine owner in the one instance, and the railway company in the other, liable for any injuries caused by accident to the builder's workmen. It was quite true that there was an indemnity clause against the employer of such workmen in certain cases, but it was only given where the employer himself, who might be a builder employing hundreds of men, would be liable for compensation. It might be convenient to put responsibility on the first man they laid hands on, but the effect of so doing would be very wide and far-reaching, and if the Bill were extended it would lead to startling consequences. He was with the noble earl in not depriving the workmen of any compensation to which they were entitled, but the clause went far beyond that. It seemed an absurdity to render liable a railway company or the owner of a colliery, and not to render liable the employer of the workmen, against whom no indemnity could be obtained.

The LORD CHANCELLOR said the objection apparently made was this. The builder in the case his noble friend referred to had a large number of persons in his employment. If that builder was himself responsible to his own workmen by reason of any negligence of his, the remedy over protected the undertakers by reason of the remedy over against the builder. It might happen that the builder himself would not be liable, and in that event he admitted that the undertaker on whose behalf the work was done by a sub-contractor was nevertheless bound to compensate the workmen. The answer appeared to be intelligible enough. A colliery owner or factory owner was perfectly competent to contract with the person who did work for him that such person should be responsible for any compensation for which the colliery owner might be liable under the Bill in the case of any accident occurring in the course of the work. That would be a perfectly intelligible

60 & 61
Vict. c. 37,
s. 4.

Sub-con-
tracting.

60 & 61
 Vict. c. 37,
 s. 4.

Sub-con-
 tracting.

and good contract, and that was the only remedy in the case supposed. But to say that a workman who was working for a railway or factory owner was not to be compensated, although an accident might happen to him, was to cut out the principle of the Bill, which was that in any event the workman was to receive compensation.

The objection raised by Lord Herschell was clearly a very weighty one. If the mine owner employed his own workmen to build cottages not thirty feet high, that being work about the mine, the employer would be liable. Thus, under this section without the last clause, the mine owner would be liable to the workmen employed by the builder, although the builder himself would not be liable, and so the mine owner would not be entitled to be indemnified by the builder.

In introducing the last clause, the Earl of Ellesmere said:—

The fourth clause was by mutual consent declared to be unintelligible in the form in which it came from the other House, and the present clause was substituted. To this new clause he had been pressed to move the amendment by persons connected with the cotton manufacturing trade, and it was intended to give effect to the intention of the original clause. Sub-contractors were generally understood to be persons who did part of the work for the business of the employer, and not work, to use the words of the amendment, not auxiliary or incidental thereto. The amendment he proposed would retain the liability of the employer for accidents in carrying out work by a contractor as part of the employer's business, but not in respect to accidents in work not connected with the trade. As he understood the clause, if the owner of a mill contracted with a painter to paint his mill or factory, and a painter's workman met with an accident by falling off a ladder, the millowner or factory owner would be liable to pay compensation, but if within the next few weeks the same owner employed the same contractor to paint his private residence, then the owner would not be liable to pay compensation for an accident of that nature. It was rather a curious position of things, and could not, he thought, be intended. It seemed to him absurdly unfair to make a man responsible in respect to a workman over whom he had no authority and of whose competence he had no means of judging. The clause further provided that the employer should have his right of indemnity against the contractor, and where the contractor was a man of substance there would be no difficulty about that, but in its operation the clause would lead to crush out smaller and struggling contractors.

When the Lords' new section was discussed in the Commons—

60 & 61
Vict. c. 37,
s. 4.

Sub-con-
tracting.

The ATTORNEY-GENERAL said that no one would deny the first part of the new clause to be an improvement. When the question was first being discussed in the House, he said that on such a difficult point he should be glad to have the assistance of the drafting of the right hon. member for Fife in the Bill of 1893. Though he pointed out objections to the right hon. member's clause, he thought it was at the time the best that had been devised. As to the clause put in by the Lords, the first sub-section was framed by the Lord Chancellor and Lord Herschell, and undoubtedly the earlier part of this clause expressed more clearly the position of the sub-contractor and the head employer. The proviso was to a large extent inspired by Lord Herschell. It was clear that the clause ought not to apply where the work done by the sub-contractor was not part of the "undertaker's" business. For instance, the painting of railway station rooms was purely ancillary to the business of a railway company. He would not say that a question might not arise upon the words "ancillary and incidental to"; but the clause was not in the interests of the employers.

Read in the light of the above speeches the meaning of the section is fairly clear, but probably questions will arise as to the meaning of the words "merely ancillary or incidental to."

5.—(1) Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company of the company having commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the judge of the county court may direct the insurers to pay such sum into the Post Office Savings Bank in the name of the registrar of such Court, and order the same to be invested or applied in accordance with the pro-

Compen-
sation to
workmen
in case of
bank-
ruptcy of
employer.

60 & 61
 Vict. c. 37,
 s. 5 (1).

visions of the First Schedule hereto with reference to the investment in the Post Office Savings Bank of any sum allotted as compensation, and those provisions shall apply accordingly.

(2) In the application of this section to Scotland, the words "have a first charge upon" shall mean "be preferentially entitled to."

Recovery
 of dama-
 ges from
 stranger.

6. Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person.

This is a difficult section, and there was considerable difference of opinion in the House of Commons as to its meaning.

In explaining it the Attorney-General said—

He desired to make perfectly plain that the clause did not increase the liability of employers at all. If anything, it was in favour of employers. Take the case of an engine which had been so badly put together that while working in a mill the fly-wheel went to pieces and injured twenty persons. That being an accident which happened in the course of employment there would be compensation under the Bill and the compensation would be payable by the employer of the workmen—that was the millowner; but as the accident was really occasioned by the engine maker, the object of the clause was to give to the employer a remedy against him. There was another case—the case of an employer who sent his carter to the railway station in order to unload goods from trucks, and a crane which was badly managed led to an accident in which the leg of a railway porter and the leg of the man who was sent with the cart were broken. There would be no remedy by the carter against his employer for that accident, but he would have a remedy

against the railway company for negligence, and, of course, the railway porter would also have a remedy against the railway company as he was in their employment.

60 & 61
Vict. c. 37,
s. 6.

At first sight the object of the section appears to be to give a remedy over to the employer against a stranger in certain cases, and if there is any further object it is not very apparent.

Recovery
of dama-
ges from
stranger.

The injury must, of course, arise "out of and in the course of the employment." (See sect. 1 (1.))

Where the stranger could plead "contributory negligence" against the workman, he would not be under legal liability to pay damages, and therefore the employer would not be liable to be indemnified. This was the intention of the Government, and they declined to accept an amendment to the effect that the stranger should not be allowed to avail himself of any defence which would not be open to the employer.

7.—(1) This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined on in or about any building which exceeds thirty feet in height⁽¹⁾, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof.

Applica-
tion of Act
and defini-
tions.

(¹) In the House of Commons Sir M. W. Ridley said—

The Government assented to the addition of buildings with this limitation of 30 ft., which was well known under the Factory Act of 1895. They did not say that it was altogether a logical definition, but what they said was that in applying this Act to various trades they were taking the already established definition.

(2) In this Act—

"Railway" means the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and includes a Light Railway

Railways.

36 & 37
Vict. c. 48.

59 & 60
Vict. c. 48.

60 & 61
 Vict. c. 37,
 s. 7 (2).

made under the Light Railways Act, 1896; and “railway”⁽¹⁾ and “railway company” have the same meaning as in the said Acts of 1873 and 1896.

36 & 37
 Vict. c. 48,
 s. 3.

The Regulation of Railways Act, 1873—

Sect. 3. The term “railway company” includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament.

⁽¹⁾ This includes tramways connected with mines and light railways, but not ordinary street tramways. In the House of Commons Mr. Holland argued that ordinary street tramways were included. He said that—

A railway was to have the same meaning as in the Act of 1873, but when he looked at that Act he found no definition of railway at all. From the point of view of law tramways were under the Railway Regulation Acts and were subject also to the control of the Railway Commissioners, although that control had not been exercised. His contention, therefore, was that it was probable that if the Bill did not specifically exclude tramways they were, as a matter of fact, included, and he submitted that tramways were eminently undertakings which could suitably be included in the provisions of the Bill.

This argument, however, appears to be rather far fetched.

It seems doubtful whether canals the property of railway companies are included.

Factory.

“Factory” has the same meaning as in the Factory and Workshop Acts, 1878 to 1891 ⁽¹⁾, and also includes any dock, wharf, quay, warehouse, machinery, or plant ⁽²⁾, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, and every laundry worked by steam, water, or other mechanical power:

58 & 59
 Vict. c. 37.

41 & 42
 Vict. c. 16,
 s. 93.

Factories
 and work-

⁽¹⁾ The Factory and Workshop Act, 1878—

Sect. 93. The expression “textile factory” in this Act means any premises wherein or within the close or curtilage of which steam, water, or other mechanical power is used to move or work any machinery employed in pre-

paring, manufacturing or finishing, or in any process incidental to the manufacture of, cotton, wool, hair, silk, flax, hemp, jute, tow, china-grass, cocoa-nut fibre, or other like material, either separately, or mixed together, or mixed with any other material, or any fabric made thereof: Provided that print works, bleaching and dyeing works, lace warehouses, paper mills, flax scutch mills, rope works, and hat works shall not be deemed to be textile factories.

60 & 61
Vict. c. 37,
s. 7 (2).

shops to
which Act
applies.

The expression "non-textile factory" in this Act means—

- (1) any works, warehouses, furnaces, mills, foundries, or places named in Part One of the Fourth Schedule to this Act (see Appendix, p. 105):
- (2) also any premises or places named in Part Two of the said Schedule (see Appendix, p. 107) wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there:
- (3) also any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes or any of them; that is to say,
 - (a) in or incidental to the making of any article or of part of any article; or
 - (b) in or incidental to the altering, repairing, ornamenting, or finishing of any article; or
 - (c) in or incidental to the adapting for sale of any article, and wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

The expression "factory" in this Act means textile factory and non-textile factory, or either of such descriptions of factories.

A part of a factory or workshop may, for the purposes of this Act, be taken to be a separate factory or workshop; and a place solely used as a dwelling shall not be deemed to form part of the factory or workshop for the purposes of this Act.

Where a place situate within the close, curtilage, or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, such place shall not be deemed to form part of that factory or workshop for the purposes of this Act, but shall, if otherwise it would be a factory or workshop, be deemed to be a separate factory or workshop, and be regulated accordingly. Any premises or place shall not be excluded from the definition of a factory or workshop by reason only that such premises or place are or is in the open air.

60 & 61
 Vict. c. 37,
 s. 7 (2).

This Act shall not apply to such workshops other than bakehouses, as are conducted on the system of not employing any child, young person, or woman therein, but, save as aforesaid, applies to all factories and workshops as before defined, inclusive of factories and workshops belonging to the Crown; provided that in case of any public emergency a Secretary of State may exempt a factory or workshop belonging to the Crown from this Act to the extent and during the period named by him.

(²) On these words the Attorney-General said in the House of Commons—

What the Government proposed was that where the machinery of the dock was being used for the purpose of loading or unloading a ship at the quay it should come under the Bill; but if that machinery was also used for unloading into a lighter, it would also, he took it, come under the Bill.

Mine.

50 & 51
 Vict. c. 58.
 35 & 36
 Vict. c. 77.

“Mine” means a mine to which the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, applies :

35 & 36
 Vict. c. 77,
 s. 3.

The Metalliferous Mines Regulation Act, 1872—

Sect. 3. This Act shall apply to every mine of whatever description, other than a mine to which the Coal Mines Regulation Act, 1887 (^a), applies.

Sect. 41. The term “mine” includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven for commencing or opening any mine, or for searching for or proving minerals, and all the shafts, levels, planes, works, machinery, tramways, and sidings, both below ground and above ground, in and adjacent to a mine, and any such shaft, level and inclined plane, and belonging to the mine.

50 & 51
 Vict. c. 58,
 s. 3.

The Coal Mines Regulation Act, 1887—

Sect. 3. This Act shall apply to mines of coal, mines of stratified ironstone, mines of shale, and mines of fire-clay.

57 & 58
 Vict. c. 42.

“Quarry” means a quarry under the Quarries Act, 1894.

57 & 58
 Vict. c. 42,
 s. 1.

The Quarries Act, 1894—

Sect. 1. This Act shall apply to every place (not being a mine) in which persons work in getting slate, stone,

(^a) Originally 1872, but now 1887, by virtue of the Coal Mines Regulation Act, 1887, s. 83.

coprolites, or other minerals, and any part of which is more than twenty feet deep, and every such place is in this Act referred to as a quarry under this Act. 60 & 61 Vict. c. 37, s. 7 (2).

“Engineering work” means any work of construction or alteration or repair of a railroad, harbour, dock, canal or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used. Engineering work.

“Undertakers” in the case of a railway means the railway company⁽¹⁾; in the case of a factory, quarry, or laundry, means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895; in the case of a mine means the owner thereof within the meaning of the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, as the case may be, and in the case of an engineering work means the person undertaking the construction, alteration or repair; and in the case of a building means the persons undertaking the construction, repair, or demolition. Undertakers.

⁽¹⁾ See *ante*, p. 28.

The Metalliferous Mines Regulation Act, 1872—

Sect. 41. The term “owner,” (a) when used in relation to any mine, means any person or body corporate who is the immediate proprietor, or lessee, or occupier of any mine, or of any part thereof, and does not include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mines (b). 35 & 36 Vict. c. 77, s. 41.

(a) See, 1876, *Stott v. Dickinson*, 34 L. T. 291.

(b) See, 1877, *Evans v. Lady Mostyn*, 2 C. P. D. 547; 47 L. J., M. C. 25.

60 & 61
 Vict. c. 37,
 s. 7 (2).

50 & 51
 Vict. c. 58,
 s. 75.

The Coal Mines Regulation Act, 1887—

Sect. 75. "Owner," (a) when used in relation to any mine, means any person or body corporate who is the immediate proprietor or lessee, or occupier of any mine, or of any part thereof, and does not include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mine (b); but any contractor for the working of any mine, or any part thereof, shall be subject to this Act in like manner as if he were an owner, but so as not to exempt the owner from any liability.

Employer.

"Employer" includes any body of persons corporate or unincorporate, and the legal personal representative of a deceased employer.

Work-
 man.

"Workman" includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship, or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependants, or other person to whom compensation is payable.

Depen-
 dants.

"Dependants" means—

(a) in England or Ireland, such members of the workman's family specified in the Fatal Accidents Act, 1846 (c), as were wholly or in part dependent upon the earnings of the workman at the time of his death; and

(a) See, 1876, *Stott v. Dickinson*, 34 L. T. 291.

(b) See, 1877, *Evans v. Lady Mostyn*, 2 C. P. D. 547; 47 L. J., M. C. 25.

(c) See *post*, p. 97.

(b) in Scotland such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death.

60 & 61
Vict. c. 37,
s. 7 (2) (b).

(3) A workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard ⁽¹⁾.

Ship-
building
yard.

(¹) As to these words in the House of Commons—

The ATTORNEY-GENERAL said it had been pointed out by the hon. member for Tyneside that the case to meet was that of riveting being begun on the ways and being continued in the adjacent water. If the words “near the yard” were omitted the case of a vessel being taken into a different port would be included, and this contemplated a different state of things. They ought not to include the case of ships generally. The Government felt that they had carried out the letter as well as the spirit of what they promised to do, namely, the continuation and completion of the same work on vessels before they were able to go out on their voyage.

8.—(1) This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to any employment by or under the Crown to which this Act would apply if the employer were a private person.

Persons in
naval and
military
service.
Workmen
of Crown.

(2) The Treasury may, by warrant laid before Parliament, modify for the purposes of this Act their warrant made under section one of the Superannuation Act, 1887, and notwithstanding anything in that Act, or any such warrant, may frame a

60 & 61
Vict. c. 37,
s. 8 (2).

scheme with a view to its being certified by the Registrar of Friendly Societies under this Act.

50 & 51
Vict. c. 67,
s. 1 (1).

Grant of
gratuity
or allow-
ance to
injured
civil
servant.

The Superannuation Act, 1887—

Sect. 1.—(1) Where a person employed in the civil service of the State is injured—

- (a) in the actual discharge of his duty; and
- (b) without his own default; and
- (c) by some injury specifically attributable to the nature of his duty,

the Treasury may grant to him, or, if he dies from the injury, to his widow, his mother, if wholly dependent upon him at the time of his death, and to his children, or to any of them, such gratuity or annual allowance as the Treasury may consider reasonable, and as may be permitted by the terms of a warrant under this section.

(2) The Treasury shall forthwith after the passing of this Act frame a warrant regulating the grant of gratuities and annual allowances under this section, and the warrant so framed shall be laid before Parliament.

(3) Provided that a gratuity under this section shall not exceed one year's salary of the person injured, and an allowance under this section shall not, together with any superannuation allowance to which he is otherwise entitled, exceed the salary of the person injured, or three hundred pounds a year, whichever is less.

Provision
as to
existing
contracts.

9. Any contract existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act.

Com-
mence-
ment of
Act and
short title.

10.—(1) This Act shall come into operation on the first day of July ⁽¹⁾ one thousand eight hundred and ninety-eight.

(¹) In order to give the employers time to consider their position.

(2) This Act may be cited as the Workmen's Compensation Act, 1897.

60 & 61
Vict. c. 37,
s. 10 (2).

SCHEDULES.

FIRST SCHEDULE.

SCALE AND CONDITIONS OF COMPENSATION.

Scale.

(1) The amount of compensation under this Act shall be—

(a) where death ⁽¹⁾ results from the injury—

(i) if the workman leaves any dependants ⁽²⁾ wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer;

(ii) if the workman does not leave any such dependants ⁽¹⁾, but leaves any dependants ⁽²⁾ in part dependent upon his earnings at the time of his death, such sum, not exceeding in any case the amount payable under the fore-

60 & 61
 Vict. c. 37,
 Sched. I.

going provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants⁽²⁾; and

- (iii) if he leaves no dependants⁽²⁾, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds;

(1) The Act thus provides a remedy which is independent of Lord Campbell's Act.

(2) As to the meaning of "dependants," see sect. 7 (2), *ante*, p. 32.

- (b) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week⁽¹⁾ not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.

(1) **After the second week.** The object of these words excluding compensation for the first two weeks is to prevent malingering.

(2) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages⁽¹⁾ which he may receive from the employer in respect of his injury during the period of his incapacity.

(1) **And to any payment not being wages, &c.** These words were not in the Bill as originally drafted. In the House of Commons,—

SIR J. JOICEY moved, in Schedule 1, to add words providing that the arbitrator should have regard to "any payment which he may receive from the employer in

respect of his injury, and to the value of any house or fuel with which he may be provided by the employer during the incapacity." He said that in Northumberland and Durham it had been the habit to give the workman incapacitated by accident house rent, coal, rates, and taxes, together with "smart money" during the time of incapacity. These contributions ought to be taken into account by the arbitrator in fixing compensation under the Bill.

60 & 61
Vict. c. 37,
Sched. I.

The Government refused to accept this amendment, but in the House of Lords they themselves introduced the words "and to any payment not being wages," &c. In explaining them Lord Belper said that—

The object of the proposal was that in fixing the amount of the weekly payment regard should be had not only to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he was able to earn after the accident, but also as to whether any payment in wages had been received for the injury already. In other words, it was intended that what was called smart money should be deducted from the compensation which was paid.

And in moving to agree with the Lords' amendment, Mr. Chamberlain said that—

This matter was discussed on the report stage of the Bill in regard not merely to the money payments, but also to the benefits which the workman was alleged to receive during his incapacity. They thought that the consideration of benefits was an indeterminate thing which they could not put in the Bill as justifying any reduction, but, on the other hand, it was necessary that, if the workman were receiving as a voluntary contribution from his employer, any portion of the compensation allotted, this should be taken into account.

(3) Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and any proceeding under this Act in relation to compensation, shall be suspended until such examination takes place.

(4) The payment shall, in case of death, be made to the legal personal representative of the workman,

60 & 61
 Vict. c. 37,
 Sched. I.

or, if he has no legal personal representative, to or for the benefit of his dependants ⁽¹⁾, or, if he leaves no dependants ⁽¹⁾, to the person to whom the expenses are due; and if made to the legal personal representative shall be paid by him to or for the benefit of the dependants ⁽¹⁾ or other person entitled thereto under this Act.

⁽¹⁾ As to the meaning of "dependants," see sect. 7 (2), *ante*, p. 32.

(5) Any question as to who is a dependant ⁽¹⁾, or as to the amount payable to each dependant ⁽¹⁾, shall, in default of agreement, be settled by arbitration under this Act.

⁽¹⁾ As to the meaning of "dependants," see sect. 7 (2), *ante*, p. 32.

(6) The sum allotted as compensation to a dependant ⁽¹⁾ may be invested or otherwise applied for the benefit of the person entitled thereto, as agreed, or as ordered by the committee or other arbitrator.

⁽¹⁾ As to the meaning of "dependants," see sect. 7 (2), *ante*, p. 32.

(7) Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar.

(8) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Post Office Savings Bank, or be accepted by the Postmaster-General as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings bank, and the declaration to be made by a depositor, shall not apply to such sums.

(9) No part of any money invested in the name of the registrar of any county court in the Post Office Savings Bank under this Act shall be paid out, except upon authority addressed to the Postmaster-General

by the Treasury or by the judge of the county court.

60 & 61
Vict. c. 37,
Sched. I.

(10) Any person deriving any benefit from any moneys invested in a post office savings bank under the provisions of this Act may, nevertheless, open an account in a post office savings bank or in any other savings bank in his own name without being liable to any penalties imposed by any statute, or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank.

(11) Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, or such other person; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

(12) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.

60 & 61
 Vict. c. 37,
 Sched. I.

(13) Where any weekly payment has been continued for not less than six months, the liability therefor may ⁽¹⁾, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled, in default of agreement, by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above-mentioned.

The chief object of this clause is to prevent the inconvenience in winding up the estate of an employer burdened with compensation payable in the case of a lengthened incapacity, and also in cases of change of residence and transfer of business.

⁽¹⁾ This leaves a discretion with the arbitrator only as to the amount for which the weekly payments should be commuted.

(14) A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same.

(15) Where a scheme certified under this Act provides for payment of compensation by a friendly society, the provisions of the proviso to the first sub-section of section eight, section sixteen, and section forty-one of the Friendly Societies Act, 1896, shall not apply to such society in respect of such scheme.

59 & 60
 Vict. c. 25.

The proviso to the first sub-section of section 8 provides that a friendly society which contracts with any person for the assurance of an annuity exceeding 50*l.* per annum, or of a gross sum exceeding 200*l.* shall not be registered under the Act. Section 16 deals with the registration of societies assuring annuities. Section 41 limits the benefits which a person is entitled to receive from a friendly society.

(16) In the application of this Schedule to Scotland the expression "registrar of the county court" means "sheriff clerk of the county," and "judge of the county court" means "sheriff."

(17) In the application of this Act to Ireland the provisions of the County Officers and Courts (Ire-

40 & 41
 Vict. c. 56.

land) Act, 1877, with respect to money deposited in the Post Office Savings Bank under that Act shall apply to money invested in the Post Office Savings Bank under this Act.

60 & 61
Vict. c. 37,
Sched. I.

SECOND SCHEDULE.

ARBITRATION.

The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration:—

(1) If any committee, representative of an employer and his workmen exists with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects, by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided.

(2) If either party so objects, or if there is no such committee, or the committee so refers the matter or fails to settle the matter within three months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the county court judge, according to the procedure prescribed by the rules (a) of Court, or if in England the Lord Chancellor so authorizes, according to the like procedure, by a single arbitrator appointed by such county court judge.

(3) Any arbitrator appointed by the county court judge shall, for the purposes of this Act, have all the powers of a county court judge, and shall be paid out of moneys to be provided by Parliament in

(a) No Rules have yet been issued.

60 & 61
 Vict. c. 37,
 Sched. II.

accordance with regulations to be made by the Treasury.

52 & 53
 Vict. c. 49.

(4) The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but the arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by Rules (a) of the Supreme Court either party appeals to the Court of Appeal; and the county court judge, or the arbitrator appointed by him, shall, for the purpose of an arbitration under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the county court.

(5) Rules (a) of Court may make provision for the appearance in any arbitration under this Act of any party by some other person.

(6) The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. The costs, whether before an arbitrator or in the county court, shall not exceed the limit prescribed by rules (a) of Court, and shall be taxed in manner prescribed by those rules.

(7) In the case of the death or refusal or inability to act of an arbitrator, a judge of the High Court at Chambers may, on the application of any party, appoint a new arbitrator.

(8) Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules (a) of Court, by

(a) No Rules have yet been issued.

the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment; Provided that the county court judge may at any time rectify such register.

60 & 61
Vict. c. 37,
Sched. II.

(9) Where any matter under this Act is to be done in a county court, or by to or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules (a) of Court, be done in, or by to or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different districts the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer in manner provided by rules of Court.

(10) The duty of a county court judge under this Act, or of an arbitrator appointed by him, shall, subject to rules (a) of Court, be part of the duties of the county court, and the officers of the Court shall act accordingly, and rules of Court may be made both for any purpose for which this Act authorises rules of Court to be made, and also generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of the county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Acts, 1888, and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent.

51 & 52
Vict. c. 43.

(a) No Rules have yet been issued.

60 & 61
 Vict. c. 37,
 Sched. II.

(11) No Court fee shall be payable by any party in respect of any proceeding under this Act in the county court prior to the award.

(12) Any sum awarded as compensation shall be paid on the receipt of the person to whom it is payable under any agreement or award, and his solicitor or agent shall not be entitled to recover from him, or to claim a lien on, or deduct any amount for costs from, the said sum awarded, except such sum as may be awarded by the arbitrator or county court judge, on an application made by either party to determine the amount of costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules (a) of Court.

(13) The Secretary of State may appoint legally qualified medical practitioners for the purpose of this Act, and any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, appoint any such practitioner to report on any matter which seems material to any question arising in the arbitration; and the expense of any such medical practitioner shall, subject to Treasury regulations, be paid out of moneys to be provided by Parliament.

(14) In the application of this Schedule to Scotland—

(a) "Sheriff" shall be substituted for "county court judge," "sheriff court" for "county court," "action" for "plaint," "sheriff clerk" for "registrar of the county court," and "act of sederunt" for "rules of Court:"

(b) Any award or agreement as to compensation under this Act may be competently recorded for execution in the books of council and session or sheriff court books, and shall be enforceable in like manner as a recorded decree arbitral:

(a) No Rules have yet been issued.

(c) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorised in writing to appear for them, and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced.

60 & 61
Vict. c. 37,
Sched. II.

39 & 40
Vict. c. 70.

(15) Paragraphs four and seven of this Schedule shall not apply to Scotland.

(16) In the application of this Schedule to Ireland the expression "county court judge" shall include the recorder of any city or town.

THE EMPLOYERS LIABILITY ACT, 1880.

43 & 44 VICT. c. 42.

An Act to extend and regulate the Liability of Employers to make Compensation for Personal Injuries suffered by Workmen in their Service.

BE IT ENACTED by the Queen's most excellent Majesty, by and with the advice and consent of the lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows:—

Amend-
ment of
law.

1. Where after the commencement of this Act personal injury is caused to a workman ⁽¹⁾.

(1) By reason of any defect ⁽²⁾ in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or

⁽¹⁾ As defined by sect 8.

⁽²⁾ Subject to sect. 2 (1) and (3).

—defect in the condition of the ways, works, machinery, or plant. **Ways.** With regard to "ways," Lord Esher, M. R., has said,

The course which a workman would in ordinary circumstances take in order to go from one part of a shop, where a part of the business is done, to another part where business is done, when the business of the employer requires him to do so, must be regarded as a "way" within the meaning of the statute (a).

(a) *Willetts v. Watt & Co.*, [1892] 2 Q. B. 92; 61 L. J., Q. B. 540.

And his lordship also said that "a 'way' need not be habitually used as such, and need not be marked out and defined" (a).

The fact that a substance has been negligently left by somebody in such a position as to obstruct the roadway is not "a defect in the condition of the way" (b).

The fact of a plank being loose and tipping up when walked on is evidence of a "defect in the condition of the ways" (c).

The fact that a workman, who had to pass close to an aperture to a staircase which was left unprotected, tripped over something and fell down the staircase is evidence of "a defect in the condition of the ways" (d).

During the building of a house the workmen obtained access to the upper part by ladders placed in a well intended for a staircase. There was another well through the house intended for a lift, down which rubbish had been thrown during the building. Upon the staircase being completed it was closed and the ladders were moved to the lift well. No precautions had been taken to prevent rubbish being thrown down after the ladders were moved. The plaintiff was ascending a ladder when a boy threw a plank down from the third floor and broke his collar bone.

Held, there was no evidence of "a defect in the condition of the ways" (e).

The plaintiff was employed by the defendants as a workman in a large workshop where a part of their business was carried on. In the workshop was a catchpit generally covered with a lid. The lid was removed for a temporary purpose, and the plaintiff in passing from one part of the workshop to another in the course of his business fell into the catchpit and was injured.

Held, that the floor of the shop where plaintiff was passing was a "way," but held that the removal of the cover from the well did not constitute a "defect in the condition of the way" (a).

The deceased had to pass from a gunboat to the shore by means of two barges moored to the shore and to each other. The ends of the barges were not round but diagonal, and the end of the foremost barge was moored, not "end on," but on the left hand side, so that a man going straight on must fall

43 & 44
Vict. c. 42,
s. 1 (1).

Defect in
the con-
dition of
the ways,
works,
machi-
nery, or
plant.

(a) *Willett v. Watt & Co.*, [1892] 2 Q. B. 92; 61 L. J., Q. B. 540.

(b) 1882, *M'Giffen v. Palmer's Shipbuilding Co.*, 10 Q. B. D. 5; 52 L. J., Q. B. 25.

(c) 1886, *Bromley v. Cavendish Spinning Co.*, 2 T. L. R. 881.

(d) 1886, *Wood v. Dorrall & Co.*, 2 T. L. R. 550.

(e) 1886, *Pegram v. Dixon*, 2 T. L. R. 801; 55 L. J., Q. B. 446

43 & 44
 Vict. c. 42,
 s. 1 (1).

into the river, and he had to turn rather to the left to get on to the diagonal end of the foremost barge, and there were no rails.

The deceased in passing two men bearing long planks, having himself a sack of coals on his shoulders, turned too much to the right and fell into the river, and was drowned. Held, there was evidence on which the jury might find a defect in the plant (*g*).

Works,
 machi-
 nery, and
 plant.
 Machinery
 out of
 order.

— **works, machinery and plant. Machinery out of order.** The fact that a band is constantly slipping off a machine is evidence of a “defect” in its condition (*h*).

A crane, on the morning of the accident, had been working erratically, occasionally dropping the load back into the barge after raising it a certain height. The work was stopped for half an hour. When it was resumed, one witness said that the crane worked better for a time, but, after a short time, it again dropped the load it was raising and injured the plaintiff. Held, that there was evidence of a “defect in the condition of the machinery” (*i*).

Machinery
 and plant
 unfit for
 the pur-
 pose to
 which it is
 applied.

— **machinery and plant unfit for the purpose to which it is applied.** The fact that a machine is unfit for the purpose to which it is applied constitutes a “defect in its condition” (*k*).

Plaintiff, a workman in defendant's employment, was injured by reason of the breaking of a ladder, which was being used to support a scaffold. The ladder was insufficient for the purpose for which it was used, and the scaffold and ladder had been placed and were being used under the directions of one of the defendants. Held, that there was evidence of a “defect in the condition of the plant” (*l*).

An employer who uses an arrangement of machinery (not in itself defective), the handling of which, as he knows, is entrusted to such men as stevedores' labourers, is not entitled to have excluded from the consideration of its “reasonable fitness” an obvious chance of danger through their want of care (*m*).

The absence, in the condition of the machinery taken as a whole, of any sufficient safeguard against danger arising from an ordinary and probable occurrence, as a slip in the management of a winch, is a “defect” (*n*).

(*g*) 1894, *Gill v. Thornycroft*, 10 T. L. R. 316.

(*h*) 1888, *Baxter v. Wyman & Sons*, 4 T. L. R. 255.

(*i*) 1887, *Bacon v. Dawes & Co.*, 3 T. L. R. 557.

(*k*) 1883, *Heske v. Samuelson*, 12 Q. B. D. 30; 53 L. J., Q. B. 45.

(*l*) 1884, *Cripps v. Judge*, 13 Q. B. Div. 583; 53 L. J., Q. B. 517.

(*m*) 1893, *Stanton v. Scrutton*, 5 R. 244; 62 L. J., Q. B. 405.

—**machinery and plant. Newest and safest.** The fact that machinery is not the newest and safest does not necessarily constitute a “defect in its condition” (*n*). 43 & 44
Vict. c. 42,
s. 1 (1).

“I agree that where something new and obviously useful is introduced into the working of a trade, and it makes the trade more safe than it was with the old machinery, there ought to be a change to the new machinery. But time must be allowed, and you cannot call on a company to substitute the new machinery at once.” Willes, J. (*o*). **Machinery
and plant.
Newest
and safest.**

“It is a question for the jury whether there is negligence in the defendants in using the old machinery.” Willes, J. (*o*).

A workmen was employed in receiving pieces of timber lowered to him by another man to the bottom of a trench 14 ft. deep by means of a hempen rope. Two pieces of timber slipped from the rope and injured the workman. The only evidence of defect was that a chain or wire rope was safer. Held, that there was no evidence of a “defect” (*p*).

A builder’s labourer was killed by the fall of a scaffolding on which he was working in the demolition of an old building. It was proved that the scaffolding had been erected by a foreman with the assistance of the deceased and of another labourer; that these three persons were all experienced in such work; that the materials were good, and the manner of constructing the scaffolding such as was usual for such work; that the cause of the accident was that while a stone was being removed from the old building it broke, and a piece of it struck a projecting part of the scaffolding, and brought down the scaffolding; that while it would have been possible to take such precautions as would have prevented the scaffolding being brought down, such precautions were not usually taken even by careful workmen doing such work. Held, that the defendant was not liable (*q*).

— **machinery and plant not belonging to employer.** An employer is not liable for injuries caused by a defect in a ladder borrowed by a fellow-workman of the plaintiff without the knowledge or sanction or authority of the employer (*r*). **Machinery
and plant
not be-
longing to
employer.**

A railway company, employed by the defendant, a coal-master, as carriers, brought empty waggons to be filled with coal to the lye of a coal pit, where they were left in charge of the defendant’s servants. Owing to a defect in the brake

(*n*) 1891, *Butler v. Brinbaum*, 7 T. L. R. 287.

(*o*) 1872, *Hanson v. L. & Y. Ry. Co.*, 20 W. R. 297.

(*p*) 1889, *Pack v. Hayward*, 5 T. L. R. 233.

(*q*) 1892, *Thomson v. Dick*, 19 Sc. Sess. Cas., 4th Series, 804.

(*r*) 1884, *Jones v. Burford*, 1 T. L. R. 137.

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Vict. c. 42,
s. 1 (1).

of one of the waggons, one of the defendant's servants was injured. Held, that the waggons were not the plant of the defendant (*s*).

Works in
course of
construc-
tion.

— **works in course of construction.** The clause does not apply to works in course of construction (*t*).

Dangerous
machi-
nery.

— **dangerous machinery.** The mere fact that a machine is dangerous to a workman employed to work with it does not show that there is a defect in the condition of the machine (*u*).

The absence, in the condition of the machinery taken as a whole, of any sufficient safeguard against danger arising from an ordinary and probable occurrence, as a slip in the management of a winch, is a "defect in its condition" (*x*).

The plaintiff, a lad of nineteen, was employed in the defendants' paper-mill at a machine for cutting jute. The material passed under a roller which conveyed it to the cutter; but the roller being in several pieces or sections, with interstices between them, into which the jute sometimes got, and so impeded the action of the machine, it was necessary (or usual) to remove it by the hand. In doing this the plaintiff lost three fingers. The defect had been pointed out to the defendants, who, to remedy it, procured a roller in one piece; but the accident happened before the new roller was placed. The maker swore that, with care, both rollers were equally safe. Held, that there was evidence for the jury that the injury was caused by a defect in the machine (*y*).

The temporary removal of a guard to machinery by a person entrusted by the employer with the duty of seeing that the machinery was in proper condition is a "defect" (*z*).

A leather-pressing machine, in every way perfect and in no way defective for the simple purpose of pressing leather, had at its side a wheel and cogs unguarded. A boy who fed the machine with leather by some means entangled his hand in this wheel and received injuries.

Held, that there was evidence for the jury of a "defect" in the condition of the machine (*a*).

(*s*) 1892, *Robinson v. John Watson, Ltd.*, 20 Sc. Sess. Cas., 4th Series, 144.

(*t*) 1885, *Howe v. Mark Finch & Co.*, 17 Q. B. D. 187.

(*u*) 1888, *Walsh v. Whiteley*, 21 Q. B. Div. 371; 57 L. J., Q. B. 586.

(*x*) 1893, *Stanton v. Scrutton*, 5 R. 244; 62 L. J., Q. B. 405.

(*y*) 1885, *Paley v. Garnett*, 16 Q. B. D. 52.

(*z*) *Tate v. Latham & Son*, [1897] 1 Q. B. 502 (C. A.); 66 L. J., Q. B. 349.

(*a*) 1890, *Morgan v. Hutchins*, 59 L. J., Q. B. 197.

— **Plant.** A horse is “plant” and vice in a horse is a “defect in its condition” (b). 43 & 44
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s. 1 (1).

— **Other cases.** Where a boy was engaged in moving certain iron stanchions on a trolley, and the stanchions were not packed or protected from falling off, and in consequence one of them fell and injured one of the boy’s fingers.

Plant.
Other
cases.

Held, that the neglect to pack or to protect them from falling off did not constitute a defect in the condition of the plant (c).

The plaintiff had to go up a temporary staging, the floor of which was made of loose planks. Owing to one of them having been insecurely placed on the cross pieces the plaintiff was injured.

Held, there was evidence of a “defect in the condition of the plant” (d).

The defendant, a builder, was engaged in pulling down an old house. After the roof had been removed and part of the walls pulled down, he ordered the plaintiff, a labourer in his employment, to remove some of the debris of the roof which lay on the ground near one of the walls which was still left standing. While the plaintiff was carrying out that order the wall, owing to the neglect of the defendant to have it shored up, fell upon the plaintiff and injured him. Held, that the dangerous condition of the wall was a “defect in the condition of the works” (e).

(2) By reason of the negligence of any person in the service of the employer who has any superintendence⁽¹⁾ entrusted to him whilst in the exercise of such superintendence ; or s. 1 (2).

(¹) As defined by sect. 8, see *post*, p. 66.

— **in the exercise of such superintendence.** A man named T., in the employment of the defendant, told the plaintiff to work in a barge. T. gave all the orders at the time of the accident, and assisted in throwing iron into the barge. Two bundles of iron had been thrown over before that which struck the plaintiff and injured him. When the

(b) 1887, *Yarmouth v. France*, 19 Q. B. Div. 647; 57 L. J., Q. B. 7.

(c) 1888, *Corcoran v. East Surrey Ironworks Co.*, 58 L. J., Q. B. 145.

(d) 1885, *Giles v. Thames Ironworks Shipbuilding Co.*, 1 T. L. R. 469.

(e) *Brannigan v. Robinson*, [1892] 1 Q. B. 344; 61 L. J., Q. B. 202.

43 & 44
 Vict. c. 42,
 s. 1 (2).

first was thrown T. came to the ship's side and called "Stand from under," but he did not do so when the bundle was thrown which struck the plaintiff. Held, that there was evidence of negligence committed in the exercise of superintendence (*f*). See also *Kellard v. Rooke*, *post*, p. 54.

An employer may be liable under sect. 1 (2) although the superintendent, when negligent, is voluntarily assisting in manual labour.

The plaintiff, a bricklayer in the employment of the defendants, was at work near a shoring, while a scaffold was being taken down by their other workmen. The defendants' foreman handed a scaffold plank to C., a labourer, and called to him to take it. C. took the end of it, but was so far off that he could not hold the plank, and, the foreman letting his end go, the plank slipped and knocked down the shoring, which fell upon the plaintiff and hurt him. Held, that there was evidence that the foreman was negligent in the exercise of superintendence (*g*).

s. 1 (3).

(3) By reason of the negligence of any person in the service of the employer, to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or

Person . .
 to whose
 orders or
 directions
 the work-
 man . . was
 bound to
 conform.

— person . . . to whose orders or directions the workman . . . was bound to conform. The plaintiff, with another workman, was employed by the defendants to work a calico-printing machine. Each machine required two men—the back-tenter, who kept the calico straight as it passed through, and the printer, who amongst other things, started it and regulated the speed. The plaintiff was a back-tenter. The printer having told the plaintiff to do something which necessitated his placing his hands between the rollers and the cylinder, before he had time to withdraw them started the machine without warning, and the plaintiff's fingers were cut. Held, there was no evidence that the printer was a person to whose orders or directions the plaintiff was bound to conform (*h*).

The plaintiff was employed by the defendant to work at a machine in a shed. A carpenter, also in the employment of the defendant, used to receive instructions from the defendant

(*f*) 1887, *Wright v. Wallis*, 3 T. L. R. 779.

(*g*) 1883, *Osborne v. Jackson and Todd*, 11 Q. B. D. 619.

(*h*) 1888, *Howard v. Bennett*, 58 L. J., Q. B. 129.

as to the work to be done, and to give orders to the plaintiff and others as to what work each of them should do, which orders they were bound to obey; but he had no control over the plaintiff in his work. One morning the plaintiff was instructed by the carpenter, as usual, as to the work to be done by him. The plaintiff worked at it, and while he was working overtime in the evening the carpenter proceeded to stack timber in the shed, which was not safe for two persons to work in at the same time. By the negligence of the carpenter some of the timber fell, causing injury to the plaintiff. Held, that there was no evidence that the carpenter was a person to whose orders or directions the plaintiff was bound to conform (*i*).

43 & 44
Vict. c. 42,
s. 1 (3).

The plaintiff, a van guard in the service of the defendants, was at the time of the accident under the age of fifteen. There was a rule of the company known to the plaintiff that no van guard under fifteen was ever to drive a van. The defendants' foreman ordered plaintiff to drive a van to market, and he would get extra pay for so doing. The boy did so and was thrown from his seat and injured. Held, that the foreman was not a person to whose orders or directions the plaintiff was bound to conform, as the rule made it clear he was not bound to obey the order (*k*).

But this case seems inconsistent with a later case, in which it was held, that the employer is liable when the order is contrary to his written rules (*l*).

It is not necessary that the order should be verbal if the man is doing what it is the ordinary course of his duty to do (*m*).

An order to "get on with your work," when it involves working in a manner which had not been usual (*e.g.*, one man doing the work of two) may involve negligence within sect. 1 (3) (*n*).

— where such injury resulted from his having so con-
formed. "I am quite clear it [the section] is not limited to an injury arising from an order, which order is negligent in itself. That is one contention put before us. I think the words in the Act of Parliament are conclusive against any such construction. It would be limiting it far beyond what

Where
such
injury
resulted
from his
having
so con-
formed.

(*i*) 1890, *Snowdon v. Baynes*, 25 Q. B. Div. 193; 59 L. J., Q. B. 325.

(*k*) 1882, *Bunker v. Midland Rail. Co.*, 47 L. T. (N. S.) 476.

(*l*) 1894, *Marley v. Osborn*, 10 T. L. R. 388.

(*m*) 1884, *Millward v. Midland Rail. Co.*, 14 Q. B. D. 68; 54 L. J., Q. B. 202.

(*n*) 1894, *Barber v. Burt*, 10 T. L. R. 383.

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the words either require or will admit of. That is all I lay down as regards the construction of the section, beyond this: that I do not think it essential to show that the conformity to the order was what has been called the *causa causans* of the injury. The negligence must be proved, and if you prove the negligence, then it is sufficient if, in addition to proving that, you also prove that the injury resulted, not from the negligence alone, but from the negligence and the conformity to the order." Lord Herschell (o).

The plaintiff was a workman in the employ of a firm of builders who were engaged in building a house. The defendants contracted with the builders to construct a lift in the house, and set D., one of their workmen, to do the work. D. applied to the builders' foreman to lend him a man to assist him, and the foreman selected the plaintiff for that purpose. While the plaintiff was so assisting D., D. told him to put a plank across the well of the lift and stand on it, and while he was standing on it D. negligently started the lift, and the plaintiff in consequence sustained injury. Held, that the injury was the result of the plaintiff's conforming to the order of D. (o).

The plaintiff was employed by the defendant to stow bales of wool in the hold of a ship. The defendant usually superintended the loading of the vessel, but B. was superintending at the time of the accident, during the temporary absence of the defendant. The workmen were divided into gangs, and B. was the foreman of the plaintiff's gang. B. was himself a labourer, working on deck, and he gave the signal to the men below when the bales were dropped down the hatchway into the hold. The plaintiff, who was below, was injured by a bale, which was dropped without sufficient warning by B. Held, that there was no evidence that the injury resulted from the plaintiff having conformed to B.'s orders, assuming that he was bound to do so (p). See also *Wright v. Wallis*, ante, p. 52.

s. 1 (4).

(4) By reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules⁽¹⁾ or bye-laws⁽¹⁾ of the employer, or in obedience to particular instructions⁽¹⁾

(o) *Wild v. Waygood*, [1892] 1 Q. B. 783; 61 L. J., Q. B. 391.

(p) 1888, *Kellard v. Rooke*, 21 Q. B. Div. 367; 57 L. J., Q. B. 599.

given by any person delegated with the authority of the employer in that behalf; or

43 & 44
Vict. c. 42,
s. 1 (4).

(1) Subject to sect. 2 (2).

— **act or omission . . . done or made in obedience . . .**
The plaintiff was employed by the defendant, the owner of a saw-mill, containing saws driven by steam power, and on a certain day he was told by the defendant's foreman to cut some wood in specified lengths with the circular saw. This work was generally performed by two men, one "feeding" the saw and the other taking the wood out from it. A. was engaged by the defendant to attend to the engine and boiler, and to assist generally in the saw mill, and was also told "not to neglect the engine." At the time in question the plaintiff was at one end of the saw frame pushing the wood through it, and A. was at the other end receiving the wood coming out from the saw. Hearing steam blowing off, A. suddenly, and without notice to the plaintiff, let go the wood and ran to the engine-room, whereupon the wood, becoming unsteady, shook the plaintiff's hand against the saw, which cut and injured his fingers. Held, that there was no evidence that the act or omission of A. was made or done in obedience to a rule or bye-law of the employer.

Act or
omission..
done or
made in
obedi-
ence...

Per Fry, L. J. : There are four questions to be answered in the affirmative before the plaintiff can succeed—

1. Was there personal injury caused to the plaintiff?
2. Was there injury caused by reason of an act or omission of any employé of the defendant?
3. Was the act or omission done or made in obedience either to a rule or a bye-law of the employer, or to particular instructions given by a delegate of the employer?
4. Whether the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions.

There was evidence on the 1st, 2nd, and 4th heads, but none on the 3rd (q).

— **delegated with the authority of the employer.** The words "delegated with the authority of the employer" refer to a manager or a person in the position of a manager, who was put into the position of his employer to do or to abstain from doing what the employer would do or abstain from doing (r).

Delegated
with the
authority
of the
employer.

(q) 1890, *Whatley v. Holloway*, 62 L. T. (N. S.) 639.

(r) 1888, *Claxton v. Mowlem*, 4 T. L. R. 756.

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 Vict. c. 42,
 s. 1 (5).

(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway.

Person...
 who has
 the charge
 or control.

— **person . . . who has the charge or control.** H., who was in the employ of a railway company as a “capstan man,” without giving the usual warning, propelled a series of trucks along a line of rails in a goods station, and injured the plaintiff. The capstan was set in motion by hydraulic power communicated to it by H. from a stationary engine at a distance. Held, there was evidence for the jury that H. had the charge or control of a train (s).

F. was a workman employed in the signal department of the defendants’ railway to clean, oil, and adjust the points and wires of the locking apparatus and to do slight repairs. He was subject to the orders of an inspector who was responsible for the points and locking gear, which were moved and worked by men in the signal boxes, being kept in proper condition. F., having taken the cover off some points and locking gear to oil them, negligently left it projecting over the metals of the line whereby injury was caused to a fellow workman. Held, that there was no evidence that F. had “charge or control” of the points (t).

A “person who has the charge or control of a train” does not necessarily cease to have charge of it, within the meaning of the Act, because some of the carriages are uncoupled from one another and from the engine, in order that they may be separately dealt with. And these words do not necessarily point only to one person who is in charge of the whole train, but may include persons who have duties to perform in respect of parts of the train (u).

An engine-driver, employed with his fireman in the discharge of loaded waggons on a railway, took a locomotive engine and several waggons to a point on an incline, and there proceeded with the engine and one of the waggons to the place of discharge, intending to return for the other waggons in due course. The fireman uncoupled the remaining waggons, and scotched them to prevent their running down the incline. One of the waggons broke away, ran down the incline, and killed a workman in the service of the same employers. There was evidence that the method of scotching adopted was unsafe, and was known to and approved

(s) 1882, *Cox v. G. W. R.*, 9 Q. B. D. 106.

(t) 1884, *Gibbs v. G. W. R.*, 12 Q. B. Div. 208; 53 L. J., Q. B. 543.

(u) *McOrd v. Cammell*, [1896] A. C. 57; 65 L. J., Q. B. 202.

by the engine-driver. Held, that there was evidence for the jury that the death was caused by reason of the negligence of a person who had the charge or control of a train within the meaning of the Act, since either the engine-driver had the charge or control, or the fireman had, and there was evidence of negligence in both (*v*).

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Vict. c. 42,
s. 1 (5).

— **locomotive engine.** A steam crane fixed on a trolley, and propelled by steam along a set of rails when it is desired to move it, is not a “locomotive engine” (*w*).

Locomotive
engine.

— **train.** Mathew, J., has said that a train was a train, whether consisting of trucks laden with goods or of carriages filled with passengers, and that a locomotive engine was not essential to the making of a train (*x*); and Lord Halsbury, L. C., has said that “a train” includes a locomotive engine by itself, or anything that is drawn along a railway, or is in course of being drawn along a railway by that locomotive engine (*w*).

Train.

— **railway.** The meaning of the term “railway” is not confined to railways belonging to railway companies, but extends to a temporary railway laid down by a contractor for the purposes of the construction of works. And Baron Huddleston said: “I think the word ‘railway’ is used in its popular sense, viz., as meaning a way upon which trains pass by means of rails” (*y*).

Railway.

The workman (¹), or, in case the injury results in death, the legal personal representative of the workman (¹), and any persons entitled in case of death, shall have the same right of compensation and remedies (²) against the employer as if the workman (¹) had not been a workman (¹) of, nor in the service of, the employer, nor engaged in his work.

(¹) As defined by sect. 8. See *post*, p. 66.

(²) That is to say, the defence of “common employment” is taken away, but every other defence will be open to the employer. See Bowen, L. J., in, 1887, *Thomas v. Quartermaine*, 18 Q. B. Div. 685; 56 L. J., Q. B. 340.

(*v*) *McOrd v. Cammell*, [1896] A. C. 57; 65 L. J., Q. B. 202.

(*w*) 1883, *Murphy v. Wilson*, 52 L. J., Q. B. 524.

(*x*) 1882, *Cox v. G. W. R.*, 9 Q. B. D. 106.

(*y*) 1883, *Doughty v. Firbank*, 10 Q. B. D. 358; 52 L. J., Q. B. 480.

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s. 2.

Excep-
tions to
amend-
ment of
law.

2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say,—

- (1) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

Plant
erected
by a con-
tractor.

—negligence of the employer. Plant erected by a contractor. A defect in plant erected by a competent contractor will not make the employer liable where there is no other evidence of negligence (*a*).

The plaintiff was injured by the fall of a wall. The foreman had observed that the wall was unsafe, and ordered a contractor to shore up the wall. This was done, and the foreman, having been assured by the contractor that the wall was safe, sent the plaintiff to his work by it. Shortly afterwards the wall fell. The foreman did not personally inspect it, but trusted to the assurance of the contractor. Held, that there was no evidence of negligence on the part of the defendants or of any person in their service entrusted by them "with the duty," &c. (*b*).

Duty to
examine
plant.

—negligence of the employer. Duty to examine plant. A workman was killed through a rope breaking, by which he was suspended in order to attach a lightning conductor to a high chimney. The evidence showed that the defect in the rope might have been caused by a "nip" in the rope, which could have been detected by the hand of a skilled person, and that no such examination took place before using the rope. Held, there was evidence of negligence on the part of the employer (*c*).

A railway company, employed by the defendant, a coal-master, as carriers, brought empty waggons to be filled with

(a) 1885, *Kiddle v. Lovett*, 16 Q. B. D. 605.

(b) 1889, *Moore v. Gimson*, 58 L. J., Q. B. 169.

(c) 1882, *Fraser v. Fraser*, 9 Sc. Sess. Cas., 4th Series, 896.

coal to the lye of a coal pit, where they were left in charge of the defendant's servants. Owing to a defect in the brake of one of the waggons one of the defendant's servants was injured. Held, that, assuming the waggons were the plant of the defendant, there was no negligence in not having them overlooked (*d*). 43 & 44
Vict. c. 42,
s. 2 (1).

—negligence of the employer. **Dangerous machinery.** Machinery could be worked by the servant in a reasonable manner without danger to himself. No instructions were given to him to work it in a mode which would endanger his safety. The safe mode, as well as the dangerous mode, of working was known to him, the danger of the latter being apparent. Held, that there was no evidence of negligence on the part of the employers (*e*). Dangerous
machinery.

—negligence of the employer. **Onus of proof.** The plaintiff had to go up a temporary staging, the floor of which was made with loose planks. Owing to one of them having been insecurely placed on the cross pieces, the plaintiff was injured. Held, that the plaintiff having proved the fact of the accident, there was no onus on him to prove that the defect had existed for such a time as to impute negligence to the defendants' servants (*f*). Onus of
proof.

(2) Under sub-section four of section one, unless s. 2 (2).
the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned; provided that where a rule or bye-law has been approved or has been accepted as a proper rule or bye-law by one of her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed, for the purposes of this Act, to be an improper or defective rule or bye-law.

(3) In any case where the workman knew of the s. 2 (3).

(*d*) 1892, *Robinson v. John Watson, Ltd.*, 20 Sc. Sess. Cas., 4th Series, 144.

(*e*) 1893, *Noonan v. The Dublin Distillery Co.*, 32 L. R. Ir. 399.

(*f*) 1885, *Giles v. Thames Ironworks Shipbuilding Co.*, 1 T. L. R. 469.

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 Viet. c. 42,
 s. 2 (3).

defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence ⁽¹⁾.

⁽¹⁾ There does not seem to have been much litigation under this sub-section. Cases in which the workman knew of the defect in the machinery, &c., have usually been defended on the common law ground of "*volenti non fit injuria*." See *post*, p. 77.

s. 3.
 Limit of
 sum re-
 coverable
 as com-
 pensation.

3. The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment, and in the district in which the workman is employed at the time of the injury.

The jury may take into consideration overtime work earned from another employer, provided they do not exceed the limit imposed by sect. 3(*g*).

The plaintiff was apprenticed to the defendants, and received a salary of 1s. a week for the first year, increasing 1s. a week each year. In the fifth year, when he was earning 5s. a week, he was injured, and brought an action to recover compensation under the Act. Evidence was given that at the end of the fifth year, when the plaintiff would be out of his apprenticeship, he would be able to earn from 14s. to 18s. a week, and the compensation was assessed at 80l. Held, that the amount which the plaintiff could earn when out of his apprenticeship could not be taken into consideration, but only the amount of his actual earnings as an apprentice; and the amount of the judgment must therefore be reduced (*h*).

(*g*) 1886, *Bortick v. Head, Wrightson & Co.*, 53 L. T. (N. S.) 909.

(*h*) *Noel v. Redruth Foundry Co.*, [1896] 1 Q. B. 453.

4. An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice ⁽¹⁾ that injury has been sustained is given within six weeks ⁽²⁾, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: Provided always, that in case of death, the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse ⁽³⁾ for such want of notice.

43 & 44
Vict. c. 42,
s. 4.

Limit of
time for
recovery
of com-
pensation.

⁽¹⁾ The notice must be in writing ⁽ⁱ⁾.

Where a workman, on the day he had been injured, made a verbal report of such injury to his employer's inspector, who took down the details in writing and sent them to the employer's superintendent, and afterwards the workman's solicitor wrote a letter to the employer stating that he was instructed by such workman to apply for compensation for injuries received on the employer's premises, "particulars of which have already been communicated to your superintendent." Held, that this was not a notice in compliance with the Act.

Query, if notice can be made by one writing referring to another writing ^(k).

⁽²⁾ Where the accident happened on May 7th, and the notice could not be received before June 19th, it was too late ^(l).

⁽³⁾ It is not a reasonable excuse for want of notice that the pursuer was an old man, and illiterate, and was not aware of the necessity of giving notice, and that it was not known whether the deceased would survive the injuries received and sue himself ^(m).

The omission to give notice in consequence of the state of

⁽ⁱ⁾ See sect. 7, and, 1881, *Moyle v. Jenkins*, 8 Q. B. D. 116.

^(k) 1882, *Keen v. Millwall Dock Co.*, 8 Q. B. Div. 482; 51 L. J., Q. B. 277.

^(l) 1886, *McDonagh v. P. & W. MacLellan*, 13 Sc. Sess. Cas., 4th Series, 100.

^(m) 1897, *McFayden v. Dalmellington Iron Co.*, 24 Sc. Sess. Cas., 4th Series, 327.

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 Vict. c. 42,
 s. 4.

mind of plaintiff, through the death of the deceased, is not a reasonable excuse (*u*).

s. 5.

Money
 payable
 under
 penalty
 to be de-
 ducted
 from com-
 pensation
 under Act.

5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action.

s. 6 (1).
 Trial of
 actions.

6.—(1) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed.

A plaintiff applied for a *certiorari* to remove the action into the High Court, on the grounds that his notice given under the Act was defective; that he desired to consolidate the

(*u*) *Connolly v. Young's Paraffin Light and Mineral Oil Co., Ltd.*,
 22 Sc. Sess. Cas., 4th Series. 80.

action with one brought by him in the superior Court to recover damages for the same injury at common law, and that the questions arising were of considerable complexity and legal difficulty. Held, that the power of removal ought only to be exercised in exceptional cases, and that no such special grounds had been shown as to induce the Court to grant the application (o).

43 & 44
Vict. c. 42,
s. 6 (1).

Trial of
actions.

(2) Upon the trial of any such action in a county court before the judge without a jury, one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

s. 6 (2).

(3) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a county court, and otherwise preventing multiplicity of such actions, rules ⁽¹⁾ and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

s. 6 (3).

(¹) See *post*, p. 71.

“County court” shall, with respect to Scotland, mean the “sheriff’s court,” and shall, with respect to Ireland, mean the “civil bill court.”

In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the Sheriff Courts (Scotland) Act, 1877.

40 & 41
Vict. c. 50.

In Scotland the sheriff may conjoin actions arising

(o) 1882, *Munday v. Thames Ironworks Co.*, 10 Q. B. D. 59; 52 L. J., Q. B. 119.

43 & 44
 Vict. c. 42,
 s. 6 (3).

out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

s. 7.

Mode of
 serving
 notice of
 injury.

7. Notice in respect of an injury under this Act shall give the name ⁽¹⁾ and address ⁽¹⁾ of the person injured, and shall state in ordinary language the cause of the injury ⁽¹⁾ and the date ⁽¹⁾ at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid ⁽²⁾ by reason of any defect ⁽¹⁾ or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the

action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

43 & 44
Vict. c. 42,
s. 7.

(¹) The absence of the name and address of the employer is not a fatal objection, but is a "defect" within the last clause (^p).

Mode of
serving
notice of
injury.

Similarly, a mistake in the initials of the defendant is merely a "defect" (^q).

Similarly, the omission of the date of the injury is merely a "defect" (^p) (^r).

A letter from the plaintiff's solicitor gave only the date of the injury, and stated that the plaintiff was and had for some time past been under treatment at a hospital for injury to his leg. Held, that there was merely a defect in the notice (^s).

The plaintiff's notice stated that she was injured in consequence of the defendants' negligence in leaving a certain hoist in their warehouse unprotected, whereby her foot was caught in the casement of the hoist and crushed. At the trial, the jury found that the accident occurred through the negligence of a superintendent in the warehouse, in allowing the plaintiff, a young girl, to go in the hoist alone. The judge was not asked to come to the conclusion that the defendant was prejudiced, or that there was any intention to mislead. Held, that the notice was sufficient (^t).

A letter as follows is sufficient: "Dear Sir,—I find I will need some more money, and will you please oblige me with ten shillings. It is now five weeks since Adam got his accident. His jaw is so badly smashed that he will never be the same man again. Adam has been advised to get damages from you." It was written by the plaintiff's wife (^u).

The notice merely stated that the plaintiff had sustained an injury at the defendant's place on August 8th, and omitted the cause of accident, the address of the plaintiff, and misstated the date, which was August 9th. Held, that there was merely a "defect" in the notice (^x).

Where a workman, on the day he had been injured, made a verbal report of such injury to his employer's inspector

(^p) 1888, *Beckett v. Corporation of Manchester*, 52 J. P. 346.

(^q) 1885, *Hearn v. Phillips*, 1 T. L. R. 475.

(^r) 1883, *Carter v. Drysdale*, 12 Q. B. D. 91; 53 L. J., Q. B. 557.

(^s) 1882, *Stone v. Hyde*, 9 Q. B. D. 76; 51 L. J., Q. B. 452.

(^t) 1882, *Clarkson v. Musgrave*, 9 Q. B. D. 386; 51 L. J., Q. B. 525.

(^u) 1884, *Thomson v. Robertson*, 12 Sc. Sess. Cas., 4th Series, 121.

(^x) 1888, *Previzi v. Gatti*, 4 T. L. R. 487.

43 & 44
 Vict. c. 42,
 s. 7.

who took down the details in writing and sent them to the employer's superintendent, and afterwards the workman's solicitor wrote a letter to the employer, stating that he was instructed by such workman to apply for compensation for injuries received on the employer's premises, "particulars of which have already been communicated to your superintendent." Held, that this was not a notice in compliance with the Act. Query, if notice can be made by one writing referring to another writing (y).

(z) The defence of "want of notice" is a "statutory defence" within Order X. rr. 10 and 18 of County Court Rules, of which notice must be given (z).

s. 8.
 Defini-
 tions.

8. For the purposes of this Act, unless the context otherwise requires—

The expression "person who has superintendence entrusted to him" means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour:

The expression "employer" includes a body of persons corporate or unincorporate:

The expression "workman" means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies.

38 & 39
 Vict. c. 90.

Person
 who has
 superin-
 tendence
 entrusted
 to him.

—person who has superintendence entrusted to him. It is not a necessary inference that the superintendence must be over the person hurt. Lord Esher, M.R. (a).

An averment that G. was the estate manager of the defender, who owned a property in Ross-shire, and that, when the defender was resident in London, the entire control and management of his estates was left in the hands of G., is sufficient (b).

The mere description of a woman as "forewoman" of the defendant, who kept a laundry, is not sufficient (c).

(y) 1882, *Keen v. Millwall Dock Co.*, 8 Q. B. Div. 482; 51 L. J., Q. B. 277.

(z) *Conroy v. Peacock*, [1897] 2 Q. B. 6; 66 L. J., Q. B. 425.

(a) 1887, *Ray v. Wallis*, 3 T. L. R. 777.

(b) 1893, *M'Leod v. Pirie*, 20 Sc. Sess. Cas., 4th Series, 381.

(c) 1890, *Moore v. Ross*, 17 Sc. Sess. Cas., 4th Series, 796. See also. 1897, *Hooper v. Holme*, 13 T. L. R. 6.

—not ordinarily engaged in manual labour. The plaintiff and one J. were employed with others by the defendants in loading sacks of corn into the hold of a ship. J.'s duty was to guide the beam of the crane by means of a guy-rope, and to give directions when to lower and hoist the chain. He neglected to use the guy-rope, and the sacks in consequence fell down the hatchway and hurt the plaintiff, who was working in the hold. Held, that J. was "engaged in manual labour" and was not "a person having superintendence entrusted to him" (d).

The plaintiff was employed by the defendant to stow bales of wool in the hold of a ship. The defendant usually superintended the loading of the vessel, but B. was superintending at the time of the accident during the temporary absence of the defendant. The workmen were divided into gangs, and B. was the foreman of the plaintiff's gang. B. was himself a labourer working on deck, and he gave the signal to the men below when the bales were dropped down the hatchway into the hold. The plaintiff, who was below, was injured by a bale which was dropped without sufficient warning by B. to enable him to get out of the way. Held, that B. was not a person who had superintendence entrusted to him (e).

—workman. The Employers and Workmen Act, 1875, Sect. 10. The expression "workman" (1) does not include a domestic or menial (2) servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour (3), whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour.

Sect. 13. This Act shall not apply to seamen (4) or to apprentices to the sea service.

(1) *Workman*. The question whether a particular person is within the definition of "workman" is one of fact, even though there may be no dispute as to the nature of his duties and the circumstances under which they are performed (f).

43 & 44
Vict. c. 42,
s. 8.

Defini-
tions.

Not ordi-
narily en-
gaged in
manual
labour.

38 & 39
Vict. c. 90,
s. 10.

s. 13.
Seamen.

(d) 1883, *Shaffers v. General Steam Navigation Co.*, 10 Q. B. D. 356; 52 L. J., Q. B. 260.

(e) 1888, *Kellard v. Rooke*, 21 Q. B. Div. 367; 57 L. J., Q. B. 599.

(f) 1893, *Pearce v. Lansdowne*, 62 L. J., Q. B. 441.

43 & 44
 Vict. c. 42,
 s. 8.

Defini-
 tions.

An omnibus conductor is not a workman (*g*).

The driver of a tramcar is not a workman (*h*).

Plaintiff was in the employment of the defendant, who was a wharfinger, and, for the purposes of his business, the owner of carts and horses. It was the duty of the plaintiff to drive the carts and to load and unload the goods which were carried in them. Held, that plaintiff was a workman (*i*).

The guard of a goods train is not a workman (*j*).

When the duties of a potman in a public-house, although manual, are substantially of a menial or domestic nature, he is not a workman (*k*).

By an agreement between the defendants and the plaintiff reciting that plaintiff, having a knowledge of mechanics, and defendants requiring the services of a person having such knowledge "to assist the firm as a practical working mechanic in developing ideas that the firm might wish to carry out, and to himself originate and carry out ideas and inventions suitable to the business of such firm, if such inventions were approved by them," it was mutually agreed that plaintiff should be employed by the firm "for the purpose above specified." Held, that plaintiff was not a "workman" (*l*).

By the rules of a mine, workmen, upon their discharge, were not entitled to receive their wages until they had returned the tools the property of the mine owner.

A miner was discharged on a Saturday, and had no opportunity to go down for his tools on that day. On the Monday he went down the pit to get the tools and was injured. Held, that he was at the time of the injury acting in the employment of the mine owner (*m*).

(*2*) *Menial*. A menial servant denotes those persons whose main duty is to do actual bodily work, as servants for the personal comfort, convenience, or luxury of the master, his family and his guests, and who, for this purpose, become part of the master's residential or quasi-residential establishment." Henn Collins, J. (*k*).

(*g*) 1883, *Morgan v. The London General Omnibus Co.*, 12 Q. B. D. 201; 53 L. J., Q. B. 352. (*Contra* in Scotland. See, 1878, *Wilson v. Glasgow Tramways and Omnibus Co.*, 5 Sc. Sess. Cas., 4th Series, 981.)

(*h*) 1887, *Cook v. The North Metropolitan Tramways Co.*, 18 Q. B. D. 683; 56 L. J., Q. B. 309.

(*i*) 1887, *Yarmouth v. France*, 19 Q. B. D. 647; 57 L. J., Q. B. 7.

(*j*) *Hunt v. G. N. R.*, [1891] 1 Q. B. 601; 60 L. J., Q. B. 216.

(*k*) 1893, *Pearce v. Lansdowne*, 62 L. J., Q. B. 441.

(*l*) 1884, *Jackson v. Hill*, 13 Q. B. D. 618.

(*m*) 1885, *Cowler v. Moresby Coal Co.*, 1 T. L. R. 575.

It has been held that a huntsman⁽ⁿ⁾ and a head gardener^(o) are menial servants, but that a husbandman^(p) is not a menial servant.

A potman in a public-house, whose duties, though manual, are substantially of a menial or domestic nature, is not a workman^(q).

⁽³⁾ *otherwise engaged in manual labour.* There is a difference of opinion as to whether the doctrine of *ejusdem generis* applies to this expression.

“The doctrine of *ejusdem generis* does not apply to the words ‘otherwise engaged in manual labour,’ because, in the first place, there would have been no necessity for the express exception of domestic or menial servants, and, secondly, because all that was included in the words would have already been included in the word ‘labourer.’” Vaughan-Williams, J. ^(q). The doctrine of *ejusdem generis* does apply to the words. Day, J. ^(r), and Smith, J. ^(s).

The expression used, it should be noted, is not manual work, but manual labour, for many occupations involve the former but not the latter, such as telegraph clerks, and all persons engaged in writing. Smith, J. ^(s).

The test of whether an employee is engaged in manual labour, within the meaning of the Employers and Workmen Act, 1875, is—whether such labour is his real and substantial employment, or whether it is incidental and necessary to such employment.

The appellant, a grocer’s assistant, whose duty it was to serve customers in a shop, had also other duties involving manual labour, such as making up parcels for customers, carrying parcels from the shop to the cart at the door, and bringing up goods from the cellar to the shop. Held, that such occupation was incidental to his real and substantial employment as a salesman, and that he was not engaged in manual labour within the meaning of the Employers and Workmen Act, 1875 ^(t).

An overlooker or superintendent was engaged half his time in supervision and the other half in manual labour. While engaged in supervision he was injured by the defective

43 & 44
Vict. c. 42,
s. 8.

Defini-
tions.

⁽ⁿ⁾ 1864, *Nicoll v. Greaves*, 33 L. J., C. P. 259; 10 L. T. 531.

^(o) 1835, *Nowlan v. Ablett*, 2 C. M. & R. 54.

^(p) 1848, *Lilley v. Elwin*, 11 Q. B. 742.

^(q) 1893, *Pearce v. Lansdowne*, 62 L. J., Q. B. 441.

^(r) 1883, *Morgan v. London General Omnibus Co.*, 12 Q. B. D. 201; 53 L. J., Q. B. 352.

^(s) 1887, *Cook v. North Metropolitan Tramways Co.*, 18 Q. B. D. 683; 56 L. J., Q. B. 309.

^(t) *Bound v. Lawrence*, [1892] 1 Q. B. 226; 61 L. J., M. C. 21.

43 & 44 machinery of his employer. Held, that he was a workman
 Vict. c. 42, within the Act (u).

s. 8. (x) *Seaman*. A foreman on board a steam canal-barge is
 not a seaman (x).

s. 9. **9.** This Act shall not come into operation until the
 Com- first day of January one thousand eight hundred and
 mence- eighty-one, which date is in this Act referred to as
 ment of the commencement of this Act.
 Act.

s. 10. **10.** This Act may be cited 'as the Employers'
 Short title. Liability Act, 1880, and shall continue in force till
 the thirty-first day of December one thousand eight
 hundred and eighty-seven, and to the end of the then
 next session of Parliament, and no longer, unless
 Parliament shall otherwise determine (1), and all
 actions commenced under this Act before that period
 shall be continued as if the said Act had not expired.

60 & 61 (1) Now in force under the Expiring Laws Continuance
 Vict. c. 54. Act, 1897.

(u) 1885, *Leech v. Gartside*, 1 T. L. R. 391.

(x) 1884, *Oakes v. Monkland Iron Co.*, 11 Sc. Sess. Cas., 4th
 Series, 579.

COUNTY COURT RULES, 1889.

ORDER XLIV.

THE EMPLOYERS' LIABILITY ACT, 1880.

Service of Summons.

1. A summons in an action brought under the provisions of the Employers' Liability Act, 1880, where it is to be served in the home district, should in order to ensure its service be delivered to the bailiff thirty-two clear days at least, and where it is to be served in a foreign district, thirty-five clear days before the return-day, but it shall in either case be served thirty clear days before the return-day thereof.

Sum-
monses
when to
be served.
43 & 44
Vict. c. 42.

1885, *Dunn v. Butler*, 1 T. L. R. 476.

The plaintiff sent the summons to the bailiff of the county court forty-two days before the hearing. The bailiff neglected to serve it until twenty-five days instead of thirty days before the hearing. The defendants appeared and cross-examined the plaintiff, but the county court judge non-suited the plaintiff, on the ground that the summons had been served too late. Held, that the non-suit must be set aside, as the defendants had waived the irregularity.

2. Particulars of demand shall be filed by the plaintiff at the time of the entry of the plaint, whatever the amount claimed may be; and a copy thereof shall be forthwith sent to the judge.

Particu-
lars to be
filed.

3. The particulars of demand shall state in ordinary language the cause of the injury, and the date at which it was sustained, and the amount of compensation claimed, and where the action is brought by more than

What par-
ticulars of
demand
shall state.

Order 44,
Rule 3.

one plaintiff, the amount of compensation claimed by each plaintiff, and where the injury of which the plaintiff complains shall have arisen by reason of the act or omission of any person in the service of the defendant, the particulars shall give the name and description of such person.

Jury.

Notice of
demand
for a jury.

4. Notice of a demand for a jury shall be given in writing to the registrar of the court fifteen clear days at least before the return-day, and the summonses to the intended jurors shall be delivered to the bailiff forthwith.

1886, *R. v. Registrar of County Court at Leeds*,
16 Q. B. D. 691; 55 L. J., Q. B. 365.

The Notice under Order XXXIX. r. 4, of the County Court Rules, 1875 (which is similar to Ord. XLIV. r. 4, of the County Court Rules, 1889), must be given fifteen clear days before the day originally fixed for the return of the summons and not before a day to which the hearing has been adjourned.

Assessors.

Qualifica-
tion of
assessors.

5. Any person who shall, as hereinafter provided, be appointed by the judge to act as an assessor in the action, shall be qualified so to act.

How as-
sessors are
to be ap-
plied for.
Form 128.

6. Where no demand for a jury shall have been made, a party who desires assessors to be appointed shall, ten clear days at least before the return-day, file an application according to the form in the appendix stating the number of assessors he proposes to be appointed, and the names, addresses, and occupations of the persons who may have expressed their willingness in writing to act as assessors. If the applicant has obtained the consent of the other party to the persons named being appointed, he shall file such consent with his application.

7. Where the application for the appointment of assessors has been made by only one party to an action, the registrar shall forward a copy of the application so made to the other party, who may then either file an application for assessors, or file objections to one or more of the persons proposed.

Order 44,
Rule 7.

Where application made by one party to be forwarded to the other.

8. Where separate applications are filed by the parties, no objection to the persons proposed shall be made by either party, but the judge may appoint from the persons named in each application one or more assessors, provided that the same number of assessors be appointed from the names given in such applications respectively.

Where both parties propose assessors, no objection to persons proposed.

9. The applications for the appointment of assessors, together with any objections made to the persons proposed, shall be forwarded by the registrar to the judge.

Application to be forwarded to judge.

10. Where the judge shall grant the application for the appointment of assessors, he shall appoint such of the persons proposed for assessors as he may think fit, subject to the provisions contained in this order.

If judge grant application he may appoint any of the persons proposed.

11. In any action where no demand for a jury has been made, and an application for the appointment of assessors has been filed, the judge may, either before or at the return-day, nominate one or more additional persons to act as assessor or assessors in the action. Where no application for assessors has been made, the judge may, if he think fit, appoint any one or more persons to act as assessors in the action before or at the return-day.

Judge, whether application has or has not been made, may appoint assessors.

12. If at the time and place appointed for the trial all or any of the assessors appointed shall not attend, the judge may either proceed to try the action with the assistance of such of the assessors, if any, as shall attend, or he may adjourn the trial generally, or upon any terms which he may think fit, or he may appoint any person who may be available and who is willing to

Where assessors fail to attend.

Order 44,
Rule 12.

Remune-
ration of
assessors.

Deposit on
applica-
tion for
assessors
of amount
of their
remune-
ration.

Remune-
ration of
assessors
not pro-
posed by
the parties
but ap-
pointed by
judge.

Where
action not
tried, an
allowance
to be made
to asses-
sors.

Assessors
to sit with
judge.

act, and who is not objected to or who if objected to is objected to on some insufficient ground, or the judge may try the action without assessors if he shall think fit.

13. Every person nominated as an assessor shall receive for each day's attendance in every action the sum of two guineas, together with such further sum, if any, for his expenses as the judge may order.

14. Every person requiring the judge to be assisted by assessors shall at the time of filing his application deposit with the registrar the sum of two guineas for each assessor proposed, and such payments shall be considered as costs in the action, unless otherwise ordered by the judge. Provided that where a person proposed as an assessor shall have in writing informed the registrar that he does not require his remuneration to be so deposited, no deposit in respect of such person shall be required.

15. Where an action shall be tried by the judge with the assistance of any assessors in addition to or independently of any assessors proposed by the parties the remuneration of such assessors shall be borne by the parties, or either of them, as the judge shall direct.

16a. (b) *If after an assessor has been appointed and before the day of trial, the registrar shall be satisfied that the action has been settled or that the services of the assessor are not required, he shall forthwith countermand the attendance of such assessor and pay to him one half of the fees paid for his attendance. The other half, less the cost of telegrams and postages, shall be returned by the registrar to the person by whom the fees were paid.* (Order XLIV., r. 16.)

17. The assessors shall sit in court with the judge, and assist him when required with their opinion and

special knowledge for the purpose of ascertaining the amount of compensation, if any, which the plaintiff is entitled to recover. Order 44,
Rule 18.

Judgment where several Plaintiffs.

18. Where two or more persons are joined as plaintiffs under Order III., r. 1, and the negligence, act, or omission which is the cause of action shall be proved, the judgment shall be for all the plaintiffs, but the amount of the sum so awarded for damages and the costs ordered to be paid to each such plaintiff shall be found and set forth in the judgment, and the amount of costs awarded in the action shall be ordered to be paid to such person and in such manner as the Court may think fit. Where
more
plaintiffs
than one,
compensa-
tion due
to each to
be found.

19. Should the defendant fail to pay the several amounts of compensation and the costs awarded in the action, execution against his goods may issue as in an ordinary action, and should the proceeds of the execution be insufficient, after deducting all costs, to pay the whole of the amounts awarded, a dividend shall be paid to each plaintiff, calculated upon the proportion of the amount which shall have been awarded to the respective plaintiffs to the total amount realized after the deduction of all the costs of the action as aforesaid. If defen-
dant fail
to pay.

COMMON LAW DEFENCES

TO ACTIONS BROUGHT UNDER THE EMPLOYERS' LIABILITY ACT, 1880.

As we have already pointed out (*a*) the effect of the Employers' Liability Act, 1880, is to destroy the defence of "common employment" in actions which are brought under its provisions.

This will, of course, leave all other defences open to the employer. We propose now to deal shortly with the usual defences made use of to actions brought under the Act.

These defences are :—

1. That the injury arose from a risk to which the plaintiff exposed himself with knowledge and of his own free will, *i.e.*, that the doctrine of *volenti non fit injuria* applies.
2. That the injury arose from "inevitable accident." (The Act itself will, as a rule, exclude this kind of action.)
3. That the plaintiff was guilty of contributory negligence.
4. That the plaintiff was a trespasser or bare licensee.
5. That the plaintiff has contracted away his right of action under the Act.

(*a*) See *ante*, p. 6.

- | | |
|--|---|
| <p>6. In cases where the injury is alleged to arise from the negligence of a servant of the defendant that the doctrine of <i>respondeat superior</i> does not apply either because—</p> <p>(a) the negligent act was not within the scope of the servant's employment,</p> <p>(b) the servant was not the servant of the defendant at the time of the accident.</p> | <p>Defences
under
1880 Act.</p> <hr/> |
|--|---|

1. That the injury arose from a risk to which the plaintiff exposed himself with knowledge and of his own free will, *i.e.*, that the doctrine of "*volenti non fit injuria*" applies.

"If a servant enters into an employment knowing there is danger and is satisfied to take the risk, it becomes part of the contract between him and his employer, that the servant shall expose himself to such risks as he knows are consistent with the employment." Willes, J. (*b*).

"Mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim *volenti non fit injuria*." Lord Esher, M. R. (*c*).

It has been held, however, that the statement of claim must allege that the servant was ignorant of the danger (*d*).

It is a question of fact for the jury whether the plaintiff undertook the risk with full knowledge of its extent, and notwithstanding the fact that he continues in the

(*b*) 1872, *Saxton v. Hawksworth*, 26 L. T. (N. S.) 851.

(*c*) 1887, *Yarmouth v. France*, 19 Q. B. Div. 647; 57 L. J., Q. B. 7. See also, 1890, *Amos v. Duffy*, 6 T. L. R. 339; and, 1890, *Sanders v. Barker*, 6 T. L. R. 324.

(*d*) 1884, *Griffiths v. London and St. Katharine's Docks*, 13 Q. B. Div. 259; 53 L. J., Q. B. 504.

Defences
under
1880 Act.

employment with full knowledge of the risk, the jury may find that he did not undertake the risk with full knowledge of its extent (*e*).

The defence arising from the maxim *volenti non fit injuria* is not applicable in cases where the injury arises from breach of a statutory duty on the part of the employer (*f*).

We shall now give some of the principal cases dealing with this difficult subject. It will be readily seen that the tendency has been to modify the doctrine in favour of the plaintiff. We think that, since the case of *Smith v. Baker* (*e*) in the House of Lords, some of the older cases, if they came up again for decision, would be treated differently. With regard to *Dynen v. Leach* a plaintiff cannot now be non-suited on his counsel's opening (*g*), but assuming these facts proved the case would have to go to the jury. In *Woodley v. The Metropolitan Rail. Co.* it would be a question for the jury whether the plaintiff undertook the risk with full knowledge of its extent. In *Thomas v. Quartermaine* the case would have to go for a new trial in order that the county court judge might say whether the plaintiff undertook the risk with full knowledge of its extent. *Church v. Appleby* is, of course, unaffected. The author makes the above remarks on these cases with the greatest diffidence, and rather by way of suggestion than otherwise. *Thomas v. Quartermaine* has always been treated with great respect, as it contains a learned and elaborate judgment by Bowen, L. J. If the above view is incorrect, *Smith v. Baker* must be distinguished on the ground that the employment was

(*e*) *Smith v. Baker*, [1891] A. C. 325; 60 L. J., Q. B. 683.

(*f*) 1887, *Baddley v. Earl Granville*, 19 Q. B. D. 423; 56 L. J., Q. B. 501.

(*g*) *Fletcher v. L. & N. W. R. Co.*, [1892] 1 Q. B. 122; 61 L. J., Q. B. 24.

not, in itself, dangerous, and that the principles there laid down do not apply when the employment itself is dangerous.

Defences
under
1880 Act.

IN FAVOUR OF PLAINTIFF.

1862, *Clarke v. Holmes*, 7 H. & N. 937; 31 L. J., Ex. 356.

The plaintiff was employed by the defendant to oil dangerous machinery. At the time the plaintiff entered upon the service the machinery was fenced, but the fencing became broken by accident. The plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced. Held, that the defendant was liable for the injury.

1887, *Yarmouth v. France*, 19 Q. B. Div. 647;
57 L. J., Q. B. 7.

The plaintiff was in the employment of the defendant, who was a wharfinger, and, for the purposes of his business, the owner of carts and horses. It was the duty of the plaintiff to drive the carts and to load and unload the goods which were carried in them. Among the horses was one of a vicious nature and unfit to be driven even by a careful driver. The plaintiff objected to drive this horse, and told the foreman of the stable that it was unfit to be driven, to which the foreman replied that the plaintiff must go on driving it, and that if any accident happened his employer would be responsible. The plaintiff continued to drive the horse, and while sitting in his proper place in the cart was kicked by the animal, and his leg was broken. Held, that the circumstances did not conclusively show that the risk was voluntarily incurred by the plaintiff.

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IN FAVOUR OF PLAINTIFF—*continued*.

1888, *Osborne v. L. & N. W. R. Co.*, 21 Q. B. D. 220 ;
57 L. J., Q. B. 618.

The plaintiff was injured by falling on steps leading to the defendants' railway station, which the defendants had allowed to be slippery and dangerous. There were other steps which plaintiff might have used, and he admitted that he knew that the steps were dangerous, and went down carefully holding the hand-rail. Held, that on this evidence the county court judge was not bound to find that the maxim "*volenti non fit injuria*" applied.

1890, *Brooke v. Ramsden*, 63 L. T. (N. S.) 287.

A workman, whose duty it was to attend to and work at a machine which was defective to his knowledge, continued to work at the machine, notwithstanding the master's refusal to repair it when the defect was brought to his notice by the workman. In consequence of the defect, the workman was injured, but was non-suited in the county court. Held, that the plaintiff's knowledge of the defect did not amount to that through comprehension of the risk incurred which alone would have justified the withdrawal of the case from the jury.

Smith v. Baker, [1891] A. C. 325 ; 60 L. J., Q. B. 683.

When a workman engaged in an employment not in itself dangerous is exposed to danger arising from an operation in another department, over which he has no control—the danger being created or enhanced by the negligence of the employer—the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to show that he has undertaken the risk so as to make the maxim "*volenti non fit injuria*" applicable in

IN FAVOUR OF PLAINTIFF—*continued.*

Defences
under
1880 Act.

case of injury. The question whether he has so undertaken the risk is one of fact and not of law. And this is so both at common law and under the Employers' Liability Act, 1880.

The plaintiff was employed by railway contractors to drill holes in a rock-cutting near a crane worked by men in the employ of the contractors. The crane lifted stones, and, at times, swung them over the plaintiff's head without warning. The plaintiff was fully aware of the danger to which he was exposed by thus working near the crane without any warning being given, and had been thus employed for months. One of the findings of the jury was that the plaintiff did not voluntarily undertake a risky employment with a knowledge of its risks. Held, that there was evidence to justify the finding of the jury.

IN FAVOUR OF DEFENDANT.

1857, *Dynen v. Leach*, 26 L. J., Ex. 221.

Action by administratrix of intestate.

At trial, plaintiff's counsel stated that the defendant was a sugar refiner, and the intestate a labourer in his employ; that it was the duty of the intestate to fill the sugar-moulds, and hoist them up to higher floors in the warehouse by means of machinery; that the usual mode of attaching the moulds to the machine was by placing them in a sort of net-bag, and which effectually prevented any accident; that this was the mode adopted by the defendant until, from motives of economy, he substituted a kind of clip; that the deceased had himself filled the mould and fastened it to the clip, but that, when it was being raised, the clip, by some jerk, slipped off the mould, which fell on his head and killed him. Held, that a non-suit on the above statement was correct.

Defences
under
1880 Act.

IN FAVOUR OF DEFENDANT—*continued*.

1877, *Woodley v. The Metropolitan District Rail. Co.*,
2 Ex. Div. 384; 46 L. J., Ex. 521.

The plaintiff, a workman in the employ of a contractor engaged by the defendants, had to work in a dark tunnel rendered dangerous by the passing of trains. After he had been working a fortnight, he was injured by a passing train. The jury found that the defendants, in not adopting any precautions for the protection of the plaintiff, had been guilty of negligence. Held, that the plaintiff, having continued in his employment with full knowledge, could not make the defendants liable for an injury arising from danger to which he voluntarily exposed himself.

1887, *Thomas v. Quartermaine*, 18 Q. B. Div. 685;
56 L. J., Q. B. 340.

The plaintiff was employed in a cooling-room in the defendant's brewery. In the room was a boiling-vat and a cooling-vat, and between them ran a passage, which was in part only 3 ft. wide. The cooling-vat had a rim raised 16 inches above the level of the passage, but it was not fenced or railed in. The plaintiff went along this passage to pull a board from under the boiling-vat. This board stuck fast and then came away suddenly, so that he fell back into the cooling-vat and was scalded. The county court judge found that the condition of the vat was known to the plaintiff. Held, that the maxim "*volenti non fit injuria*" applied, and judgment entered for the defendant.

1888, *Church v. Appleby*, 58 L. J., Q. B. 144.

Where a workman was employed on a staging in the middle of the river T., which was protected on one side only, and it was part of his duty to work on the unpro-

IN FAVOUR OF DEFENDANT—*continued.*

Defences
under
1880 Act.

tected side, and, in the course of his employment, he fell over at night and was drowned, the jury found that the structure was defective, and that the deceased lost his life in consequence of the defect; but they also found that he knew of the defect, and was willing to incur the risk. Held, there was evidence for the jury that he did so voluntarily incur the risk, and that his widow could not recover damages.

2. That the injury arose from "inevitable accident."

Under this head is included injury arising from the act of God, or the king's enemies, and also injuries arising from latent defects in machinery which could not be guarded against in the process of construction (*h*), and which could not have been observed by the use of ordinary and reasonable care (*i*).

3. That the plaintiff was guilty of contributory negligence.

In order for the plaintiff to succeed, he must show that the negligence of the defendant was the proximate cause of the accident. "Proximate" is the word generally used, but it does not refer to time, and Sir Frederick Pollock prefers the expression "decisive cause" (*k*).

Thus it will be an answer to the plaintiff's claim if the defendant can show that either before, or at the time of, or after the negligence alleged, the plaintiff was

(*h*) 1877, *Readhead v. Midland Railway Co.*, L. R., 2 Q. B. 412; 38 L. J., Q. B. 169.

(*i*) 1861, *Stokes v. Eastern Counties Rail. Co.*, 2 F. & F. 691 (Cockburn, C. J.).

(*k*) See Pollock on Torts, 4th ed., p. 417.

Defences
under
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guilty of negligence which was the proximate cause of the injury.

If the defendant can show this, he will have established the defence of contributory negligence.

1. If, prior to the negligence of the defendant, the plaintiff has been guilty of negligence, the question for the jury, in order to determine which negligence is the proximate cause of the accident, is usually put in the following form:—

Although the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. (l).

2. If, contemporaneously with the negligence of the defendant, the plaintiff has been guilty of negligence, the question for the jury will be—

Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened (m).

3. If, after the negligence of the defendant, the plaintiff has been guilty of negligence, the question for the jury will be—

Whether the plaintiff could, by the exercise of

(l) Lord Penzance in, 1876, *Rudley v. L. & N. W. R. Co.*, 1 App. Cas. 759; 46 L. J., Ex. 573.

(m) The Court in, 1858, *Tuff v. Warman*, 5 C. B. (N. S.) 585; 27 L. J., C. P. 322.

such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence (n).

Defences
under
1880 Act.

It is beyond the scope of this work to deal exhaustively with the subject of "contributory negligence," and for the consideration of difficult cases not covered by the above principles, reference must be made to the larger works on Torts.

There remain two points which it is necessary to notice, *i.e.*, contributory negligence of strangers and children.

With regard to strangers, speaking generally, contributory negligence on the part of a stranger is no defence. (See Pollock on Torts, 4th ed., p. 424.)

With regard to children, it may be stated generally that what would be contributory negligence on the part of an adult may not be contributory negligence on the part of a child (*o*). Where a child is in the charge of a grown up person, and an accident happens to the child in which the grown up person is guilty of contributory negligence, the child will not be able to recover (*p*).

4. That the plaintiff was a "trespasser" or "bare licensee."

It is obvious that this defence takes us out of the scope of the law dealing with "employer" and "workman" into the wide fields of the common law. An employer cannot generally be in a position to say

(n) Lord Blackburn in, 1878, *Dublin, Wicklow, & Wexford R. Co. v. Slattery*, 3 App. Cas. 1207.

(o) 1888, *Crocker v. Banks*, 4 T. L. R. 324.

(p) 1858, *Waite v. N. E. R.*, E. B. & E. 719; 28 L. J., Q. B. 258

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that his "workman" is a "trespasser" or "bare licensee." Accordingly, as might be expected, the cases dealing with this subject are not cases under the Employers' Liability Act at all. The subject is, however, an important one, and borders closely on the law of employer and workman, and we, therefore, think it desirable to notice it shortly.

The law as regards a "bare licensee" has been stated as follows:—

"What, then, is the duty of an owner of premises to a mere licensee? His liabilities differ when the matter complained of is a defect in the premises, and when the matter complained of is an act of misfeasance, or, in other words, when the matter complained of is active negligence on the part of the defendant towards the plaintiff. As regards the first, the owner of premises is under no liability to a licensee, unless something in the nature of a trap or concealed danger exists (see *Corby v. Hill*); for the licensee must take the premises as he finds them, and there is no obligation to alter the premises for his safety or convenience. He must take them as they are, save as above-mentioned, for better and for worse." "When, however, misfeasance is what is complained of, it is the duty of the owner of premises not to neglect to use ordinary care and skill towards the licensee in what the owner is doing, so that the licensee may not be thereby injured. If the owner does so neglect, and the licensee is thereby injured, the owner is liable." . . . "The point is, was there evidence that when the defendant was guilty of the carelessness complained of, he had reason to suppose that the licensee would be where he was, and in consequence of such carelessness would be injured as he was?" Smith, J. (*q*).

(*q*) 1888, *Tolhausen v. Davies*, 57 L. J., Q. B. 392.

It is sometimes rather difficult to determine whether or not the plaintiff is a "bare licensee." It has been held, that where the plaintiff is engaged, with the consent and invitation of the defendant, in a transaction of common interest to both parties, he is not a "mere licensee" (r).

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under
1880 Act.

In a later case, Lord Esher, M. R., laid down the following principle, which goes a step further in favour of the plaintiff (s) :—

"Whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

This principle was, perhaps, not necessary for the decision of *Heaven v. Pender*, but it has been adopted and taken as the principle for the decision of a later case (t).

5. That the plaintiff has contracted away his right of action under the Act.

It is competent to a workman to contract with his employer not to claim compensation for personal injuries under the Employers' Liability Act, 1880 (u).

(r) 1869, *Holmes v. N. E. R.*, L. R., 4 Ex. 254; 40 L. J., Ex. 121; 1876, *Wright v. L. & N. W. R. Co.*, 1 Q. B. D. 252; 45 L. J., Q. B. 570.

(s) 1883, *Heaven v. Pender*, 11 Q. B. Div. 503; 52 L. J., Q. B. 702.

(t) 1888, *Thrussel v. Handyside*, 20 Q. B. D. 359; 57 L. J., Q. B. 347.

(u) 1882, *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357; 51 L. J., Q. B. 543.

Defences
under
1880 Act.

Notices were posted to the effect that from the weekly wages to the workmen certain sums would be deducted to secure certain insurance benefits in case of accident, and that any workman accepting such benefits would be held to have discharged all claims against his employers. The notices were well known to the defendant's workmen, and the pursuer had taken benefit of the insurance. Held, that the pursuer must be held to have known of and assented to the conditions (*x*).

An infant may contract away his right of action if the contract with the employer is on the whole for the benefit of the infant (*y*).

6. In cases where the injury is alleged to arise from the negligence of a servant of the defendant, that the doctrine of "respondeat superior" does not apply, either because—

- (a) The negligent act was not within the scope of the servant's employment ;
- (b) The servant was not the servant of the defendant at the time of the accident.

(a) When a plaintiff brings an action against a defendant for injuries received, through the negligence of the defendant's servants, he relies on the principle *respondeat superior*, that is to say, that the master is liable for the acts of his servants.

To such an action it is, however, a complete defence that the negligent act complained of was not within the scope of the servant's employment.

(*x*) 1893, *Wright v. Howard, Baker & Co.*, 21 Sc. Sess. Cas., 4th Series, 25.

(*y*) *Clements v. L. & N. W. R.*, [1894] 2 Q. B. 482; 63 L. J., Q. B. 837.

Sir Frederick Pollock in his *Work on Torts* (z) gives the following as the four instances in which a wrongful act is considered to be within the scope of the servant's employment :—

Defences
under
1880 Act.

- (1) It may be the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders.
- (2) It may be due to the servant's want of care in carrying on the work or business in which he is employed.
- (3) The servant's wrong may consist in excess or mistaken execution of a lawful authority.
- (4) It may even be a wilful wrong, such as assault, provided the act is done on the master's behalf and with the intention of serving his purposes.

(1) The first instance is obvious, and hardly needs illustration.

(2) In the second instance there is often a difficulty in deciding whether the servant is or is not carrying on the work or business on which he is employed. If the servant is not doing the master's business, but is doing something on his own behalf, the master is not liable. On the other hand, trivial facts will be disregarded in considering whether a servant has left off doing his master's business. Thus, where a carter who had orders not to leave his horse and cart on the place where he was employed, but was allowed an hour for dinner, went home to dinner leaving the horse and cart unattended, and an accident happened, the employer was held liable (a); but where the carman took the horse and cart out of his proper route to call at a house on business of his own, the employer was held not liable; but the Court held that the employer would have been

(z) Pollock on Torts, 4th ed., p. 76.

(a) 1868, *Whatman v. Pearson*, 3 C. P. 422; 37 L. J., C. P. 156.

Defences
under
1880 Act.

liable if the carman had been merely going a round-about way home (b).

(3) Of this a good example is *Bayley v. Manchester, Sheffield and Lincolnshire Rail. Co.* (c), in which a porter, thinking a passenger was in the wrong train, pulled him out, when in fact he was in the right train. It was the duty of the porter to see that passengers did not get into wrong trains, but not to remove them from wrong trains. The company were held liable.

(4) Of this a good example is the well-known case of *Limpus v. London General Omnibus Co.* (d), in which the driver had purposely obstructed the plaintiff's omnibus by pulling across the road in front of it, thereby upsetting it. He had printed instructions not to obstruct other omnibuses. Martin, B., directed the jury—

“That, where the relation of master and servant existed, the master was responsible for the reckless and improper conduct of the servant in the course of the service; and that if the jury believed that the real truth of the matter was that the defendants' driver, being dissatisfied and irritated with the plaintiffs' driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants are responsible for the act of their servant; but that if the true character of the act of the defendants' servant was that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible.”

This direction was upheld by the Exchequer Chamber.

(b) 1869, *Storey v. Ashton*, L. R., 4 Q. B. 476; 38 L. J., Q. B. 223.

(c) 1873, 8 C. P. 148; 42 L. J., C. P. 78.

(d) 1862, 1 H. & C. 526; 32 L. J., Ex. 34.

(b) The defence that the servant, by whose wrongful act the injury is caused, is not the servant of the defendant at the time of the accident, is obviously a complete answer to an action founded on the doctrine of "*respondeat superior*."

Defences
under
1880 Act.

1. *Sub-contractors*.—When the defendant has employed a sub-contractor to do the work, he is not liable for the negligence of the sub-contractor or his workmen (*e*).

The fact that the defendant reserves to himself the power of dismissing any of the contractor's workmen for incompetence does not make him responsible for the negligence of the workmen (*f*).

"The test, I think, always is, had the superior personal control or power over the acting, or mode of acting, of the subordinate?" (*g*).

The following are the principal cases on this subject, and they show that very slight evidence of control over the sub-contractor's workmen is sufficient to fix the defendant with liability:—

IN FAVOUR OF PLAINTIFF.

1885, *Brown v. Butterley*, 53 L. T., N. S. 964.

The defendants were owners of a coal mine worked under the "butty" system. In mines so worked, "butty" men contract with the owners of the mine to bring coal up at so much per ton, and, for this purpose, employ men under them. The deceased had been so

(*e*) 1842, *Rapson v. Cubitt*, 9 M. & W. 710.

(*f*) 1849, *Reedie v. L. & N. W. R. Co.*, 4 Ex. 244; 20 L. J., Ex. 65.

(*g*) Lord Gifford in, 1876, *Stephen v. Thurso Police Commissioners*, 3 Sc. Sess. Cas., 4th Series, 535.

Defences
under
1880 Act.

IN FAVOUR OF PLAINTIFF—*continued*.

employed, and had been killed by an explosion while working in the mine. Both the “butty” men and the men employed by them were subject to the rules of the defendants, and liable to be dismissed by the defendants if they broke them. Held, the defendants were liable (*h*).

1887, *Levering v. St. Katharine's Dock Co.*, 3 T. L. R. 607; *Doe v. St. Katharine's Dock Co.*

The company employ a person to land cargoes from ships in the docks at certain rates per ton—“labour rate,” 6*d.* per hour, which is the rate at which he pays the men, and has advances of money daily to pay them. There was evidence that the men were not admitted to the docks without tickets issued by the company, and that sometimes the company got men dismissed, though this was through the intervention of the person aforesaid. Held, that there was evidence for the jury that the person so employed was not an independent contractor.

1894, *Oldfield v. Furness*, 58 J. P. 102.

Injuries received through the negligence of S. who was under the control of J. J. was a man who worked himself, and he got other men to work for him, and if J. did not do the work as the defendants thought it ought to be done, they could tell him to go, without committing any breach of contract. The defendants had also called J. “their foreman.” Held, there was evidence to go to the jury that J. was the servant of the defendants.

(*h*) See also, 1882, *Morrison v. Baird*, 10 Sc. Sess. Cas., 4th Series, 271.

IN FAVOUR OF THE DEFENDANT.

Defences
under
1880 Act.

1884, *Manning v. Adams*, 32 W. R. 430.

The plaintiff, employed as foreman of a stevedore to unload a ship with the assistance of the crew, was injured by the negligence of one of the crew in the quasi-employment of the stevedore. Held, that the shipowners were not liable.

1892, *Sweeney v. Duncan*, 19 Sc. Sess. Cas., 4th Ser. 870.

A firm of shipbuilders were in the practice of entering into contracts for the execution of certain pieces of work within their yard with squads of fitters. Each of these men employed labourers to assist in his part of the work, who were exclusively under his control and direction, and who were paid 7*d.* an hour by the squad. When the piece of work was finished, the squad divided the profit among themselves. The shipbuilder's foreman inspected the work as it proceeded to see that the result was satisfactory, but did not interfere with the work. Held, that the shipbuilders were not liable to a labourer for injuries received through the negligence of a fitter.

2. *Loan of Servant*.—"When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him": Lord Esher, M.R., citing Cockburn, C.J. (*i*).

"It makes no difference whether the servant is lent gratuitously or not": Lord Esher, M.R., and Bowen, L.J. (*i*).

(*i*) *Donovan v. Laing*, [1893] 1 Q. B. 629; 63 L. J., Q. B. 25.

Defences
under
1880 Act.

The question is not merely whether the defendants have given up the servant to perform the operation in question, but whether they have given up all right of interference with the operation, and unless the evidence is clear and uncontradicted, the case must go to the jury (*k*).

Cases.

FOR THE PLAINTIFF.

1886, *Moore v. Palmer*, 2 T. L. R. 780.

M. was the foreman of H., a master stevedore, who contracted to load a ship. H. hired a barge and donkey-engine from the defendant which the defendant sent to the loading in charge of N., whose wages were paid by the defendant. In the loading, the cargo in sacks was raised by the engine worked by N., who obeyed signals from M. By the negligence of N. a sack fell on M. and killed him. Held, there was evidence on which a jury might find that N. was the servant of the defendant.

FOR THE DEFENDANT.

1870, *Murray v. Currie*, 6 C. P. 24; 40 L. J., C. P. 26.

The defendant employed a stevedore to unload his vessel. The stevedore employed his own labourers, amongst whom was the plaintiff, and also one of the defendant's crew, named Davis, whom he paid, and over whom he had entire control, to assist them in unloading. The plaintiff, while engaged in the work, was injured through the negligence of Davis. Held, that the defendant was not responsible for the injury.

(*k*) 1896, *Cahalane v. North Metropolitan Railway and Canal Co.*, 12 T. L. R. 611.

1877, *Rourke v. The White Moss Colliery Co.*, 2 C. P. Div. 205 ; 46 L. J., C. P. 283.

Defences
under
1880 Act.

The defendants, having begun sinking a shaft in the colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with W. to do the sinking and excavating at a certain price per yard, W. to find all labour, the defendants to provide and place at the disposal of W. the necessary engine power and tackle, with an engineer to work the engine (who was employed and paid by the defendants), the engine and engineer to be under the control of W. The plaintiff, who was employed and paid by W., while working at the bottom of the shaft was injured by the negligence of the engineer. Held, that though the engineer remained the general servant of the defendants, yet, being under the orders and control of W. at the time of the accident, he was acting as the servant of W., and not of defendants, who were therefore not liable for his negligence.

Donovan v. Laing, [1893] 1 Q. B. 629; 63 L. J., Q. B. 25.

The defendants lent to a firm, who were engaged in loading a ship at their wharf, a crane with a man in charge of it. This man received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. The plaintiff, who was a servant of the firm and was employed by them to direct the working of the crane, was injured through being struck by it by reason of the negligence of the man in charge, and sued the defendants on the ground that the negligence was the act of their servant. Held, that, though the man in charge of the crane remained the general servant of the defendants, yet, as they had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed.

APPENDIX A.



THE FATAL ACCIDENTS ACT, 1846

(LORD CAMPBELL'S ACT).

9 & 10 VICT. c. 93.

*An Act for compensating the Families of Persons killed
by Accidents.* [26th August 1846.]

WHEREAS no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

An action to be maintainable against any person causing death through neglect, &c., notwithstanding the death of the person injured.

9 & 10
Vict. c. 93,
s. 2.

Action to
be for the
benefit of
certain
relations,
and shall
be brought
by and in
the name
of execu-
tor or
adminis-
trator
of the
deceased

2. And be it enacted, that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

— **wife.** For many years prior to her husband's death the plaintiff had been living in adultery with another man. The deceased occasionally gave her small sums of money. Held, there was no evidence of pecuniary loss (*a*).

— **husband.** For many years before her death the wife of plaintiff had lived apart from him. She was absolutely entitled to 7,000*l.* on the death of her mother in her lifetime. Held, no evidence of pecuniary loss; the contingency of the plaintiff becoming entitled to an interest in the money through a suit for restitution of conjugal rights is too remote (*b*).

— **parent.**—*Grown-up children.* Damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of life. In an action by a father for injury resulting from the death of his son, it appeared that the father was old and infirm; that the son, who was young and earning good wages, assisted his father in some work for which the father was paid 3*s.* 6*d.* a week. The jury found a verdict for the plaintiff for 75*l.* Held, that the action was maintainable (*c*).

The pecuniary loss must arise from relationship and not from a contract. The deceased was a bricklayer, and received from the plaintiff, his father, the wages of a skilled workman; he was of great assistance to the plaintiff; owing to the death of deceased, the plaintiff could not take the contracts which

(*a*) 1888, *Stimpson v. Wood*, 57 L. J., Q. B. 484.

(*b*) 1885, *Harrison v. L. & N. W. R. Co.*, 1 T. L. R. 519.

(*c*) 1858, *Franklin v. S. E. R.*, 3 H. & N. 211.

he had done during his son's lifetime. Held, no evidence of pecuniary loss (*d*).

9 & 10
Vict. c. 93,
s. 2.

The father, whose son was killed, was fifty-nine years old, nearly blind, and injured in his leg and hands, and not so able to work as he had been. Five or six years previously the father was out of work and the son had helped him, but he had had no money from the son since. Held, there was evidence for the jury of pecuniary loss (*e*).

As to the questions for the jury where the pecuniary loss arises from a covenant to pay an annuity to his mother by the deceased during their joint lives, see *Rowley v. L. & N. W. R. Co.*, L. R., 8 Ex. 221.

Young children.—Some tincture of rhubarb had been sent for to give a child, but, instead of tincture of rhubarb, laudanum was sent and taken by the child causing its death. The child was then living at home getting nothing, but pecuniarily then a burden to its parents. The jury found a verdict for the plaintiff for 15*l*.

Rule *nisi* granted to set it aside, not so much because the Court entertained doubt in the matter, but because the question was important and the judge had doubts at the trial (*f*).

(*It does not appear that the matter was ever proceeded with.*)

The plaintiff was the father of deceased (aged fourteen), who had earned 4*s*. a week for about a year or two, but at the time of his death was without employment. Held, there was evidence of pecuniary loss (*g*).

The plaintiff was a widow and mother of deceased (aged 14), who had never earned any wages, but whose capabilities were valued at 6*d*. per day. Held, there was evidence of pecuniary loss (*h*).

It did not appear that the plaintiff had ever received from the deceased (aged 14) any benefits or services of pecuniary value. The boy had been educated for mercantile pursuits, and in a few years, had he lived, his services would have been worth a substantial salary. The plaintiff was a tradesman, and his position rendered him independent of any earnings his son might be competent to gain. Held, no evidence of pecuniary loss (*i*).

(*d*) 1875, *Sykes v. N. E. R.*, 44 L. J., C. P. 191.

(*e*) 1882, *Hetherington v. N. E. R.*, 9 Q. B. D. 160; 51 L. J., Q. B. 495.

(*f*) 1857, *Bramall v. Lees*, 29 L. T. (O. S.) 111.

(*g*) 1859, *Duckworth v. Johnson*, 4 H. & N. 653; 29 L. J., Ex. 25.

(*h*) 1865, *Condon v. Great Southern & Western R. Co.*, 16 Ir. C. L. R. 415.

(*i*) 1879, *Bourke v. Cork & Macroom R. Co.*, 4 L. R., Ir. 682.

9 & 10
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s. 2.

The plaintiff was the father of deceased (aged 7), and the only evidence of pecuniary loss was that she had been in the habit of rendering trifling household services. Held, no evidence of pecuniary loss (*k*). This Irish case does not seem consistent with the view that the verdict in *Branall v. Lees*, *supra*, was correct, and it would hardly be safe to rely on it in England.

— **child.** A child *en ventre sa mère* is entitled to recover damages on the death of its father (*l*). A bastard can maintain no action under the statute (*m*).

In the case of the death of the father of a young family with an ample estate, the question of fact for the jury is whether he might be reasonably expected to have advanced moneys out of his estate for their education and advancement in life (*n*).

— **damages.** The jury cannot take into consideration mental suffering or loss of society, but must give compensation "for pecuniary loss only" (*o*).

It is not competent for the jury to award compensation for the expenses of the deceased's funeral or for family mourning (*p*).

Damages under this Act are not to be estimated according to the value of the deceased's life calculated by annuity tables, but the jury should give what they consider a fair compensation (*q*).

If the plaintiff is entitled to a policy of insurance against accidents on the life of the deceased, this must be deducted from the pecuniary loss.

With regard to other policies on his life independently of accident, a deduction should be made for the premiums that would have been paid if the accident had not happened (*r*).

(*k*) 1879, *Holleran v. Bagnell*, 6 L. R., Ir. 333.

(*l*) 1871, *The George and Richard*, 24 L. T. (N. S.) 717.

(*m*) 1863, *Dickenson v. N. E. R.*, 2 H. & C. 735; 33 L. J., Ex. 91.

(*n*) 1861, *Pym v. G. N. R.*, 2 F. & F. 619; 2 B. & S. 759; 4 B. & S. 396.

(*o*) 1852, *Blake v. Midland R. Co.*, 18 Q. B. 93; 21 L. J., Q. B. 233.

(*p*) 1858, *Dalton v. S. E. R.*, 4 C. B., N. S. 296; 27 L. J., Q. B. 227.

(*q*) *Armstrong v. S. E. R.*, 11 Jurist, 758.

(*r*) 1857, *Hicks v. Newport, Abergavenny & Hereford R. Co.*, 4 B. & S. 403 (note). See also, 1874, *Bradburn v. G. W. R.*, L. R., 10 Ex. 1; 44 L. J., Ex. 9; 1888, *The Grand Trunk Railway of Canada v. Jennings*, 58 L. J., P. C. 1.

Where deceased accepted a sum of money in satisfaction of all claims and causes of action he had against defendants : Held, that his death did not create a fresh cause of action, and that his widow could not recover damages (s).

9 & 10
Vict. c. 93,
s. 2.

3. Provided always, and be it enacted, that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

Only one action shall lie, and to be commenced within 12 months.

4. And be it enacted, that in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

Plaintiff to deliver a full particular of the person for whom such damages shall be claimed.

5. And be it enacted, that the following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter; that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word "person" shall apply to bodies politic and corporate; and the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word "child" shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

Construction of Act.

6. And be it enacted, that this Act shall come into operation from and immediately after the passing thereof, and that nothing therein contained shall apply to that part of the United Kingdom called Scotland.

Act to take effect after passing, and not to apply to Scotland.

(s) 1868, *Read v. G. E. R.*, L. R., 3 Q. B. 555.

9 & 10
Vict. c. 93,
s. 7.

Act may
be amen-
ded, &c.

7. And be it enacted, that this Act may be amended or repealed by any Act to be passed in this session of Parliament.

LORD CAMPBELL'S ACT AMEND- MENT ACT.

27 & 28 VICT. C. 95.

An Act to amend the Act Ninth and Tenth Victoria, Chapter Ninety-three, for compensating the Families of Persons killed by Accident.

[29th July 1864.]

9 & 10
Vict. c. 93

WHEREAS by an Act passed in the session of Parliament holden in the ninth and tenth years of her Majesty's reign, intituled "An Act for compensating the Families of Persons killed by Accident," it is amongst other things provided, that every such action as therein mentioned shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused as therein mentioned, and shall be brought by and in the name of the executor or administrator of the person deceased: And whereas it may happen by reason of the inability or default of any person to obtain probate of the will or letters of administration of the personal estate and effects of the person deceased, or by reason of the unwillingness or neglect of the executor or administrator of the person deceased to bring such action as aforesaid, that the person or persons entitled to the benefit of the said Act may be deprived thereof; and it is expedient to amend and

extend the said Act as hereinafter mentioned: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

27 & 28
Vict. c. 95.

1. If and so often as it shall happen at any time or times hereafter in any of the cases intended and provided for by the said Act that there shall be no executor or administrator of the person deceased, or that there being such executor or administrator no such action as in the said Act mentioned shall within six calendar months after the death of such deceased person as therein mentioned have been brought by and in the name of his or her executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator ; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure as nearly as may be, as if it were brought by and in the name of such executor or administrator.

Where no action brought within six months by executor of person killed, then action may be brought by persons beneficially interested in result of action.

2. And whereas by the second section of the said Act it is provided that the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided between the before-mentioned parties in such shares as the jury shall by their verdict direct : Be it enacted and declared, that it shall be sufficient, if the defendant is advised to pay money into Court, that he pay it as a compensation

Money paid into Court may be paid in one sum, without regard to its division into shares.

27 & 28
Vict. c. 95,
s. 2.

If not
accepted,
defendant
entitled to
verdict on
the issue.

This and
recited
Act to be
read as
one.

in one sum to all persons entitled under the said Act for his wrongful act, neglect, or default, without specifying the shares into which it is to be divided by the jury; and if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the jury shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue.

3. This Act and the said Act shall be read together as one Act.

APPENDIX B.

THE FACTORY AND WORKSHOP ACT, 1878.

41 & 42 VICT. c. 16.

FOURTH SCHEDULE.

Sects. 93,
96.

LIST OF FACTORIES AND WORKSHOPS.

PART ONE.

Non-textile Factories.

- | | | |
|-----|--|-----------------------------|
| (1) | "Print works," that is to say, any premises in which any persons are employed to print figures, patterns, or designs upon any cotton, linen, woollen, worsted, or silken yarn, or upon any woven or felted fabric not being paper; | Print works. |
| (2) | "Bleaching and dyeing works," that is to say, any premises in which the processes of bleaching, beetling, dyeing, calendering, finishing, hooking, lapping and making up and packing any yarn or cloth of any material, or the dressing or finishing of lace, or any one or more of such processes, or any process incidental thereto, are or is carried on; | Bleaching and dyeing works. |
| (3) | "Earthenware works," that is to say, any place in which persons work for hire in making, or assisting in making, finishing, or assisting in finishing, earthenware of any description, except bricks and tiles not being ornamental tiles; | Earthenware works. |
| (4) | "Lucifer-match works," that is to say, any place in which persons work for hire in making lucifer- | Lucifer-match works. |

41 & 42
 Vict. c. 16,
 Sched. 4.

matches or in mixing the chemical materials for making them, or in any process incidental to making lucifer-matches, except the cutting of the wood ;

Percus-
 sion-cap
 works.

(5) "Percussion-cap works," that is to say, any place in which persons work for hire in making percussion caps, or in mixing or storing the chemical materials for making them, or in any process incidental to making percussion caps ;

Cartridge
 works.

(6) "Cartridge works," that is to say, any place in which persons work for hire in making cartridges, or in any process incidental to making cartridges, except the manufacture of the paper or other material that is used in making the cases of the cartridges ;

Paper-
 staining
 works.

(7) "Paper-staining works," that is to say, any place in which persons work for hire in printing a pattern in colours upon sheets of paper either by blocks applied by hand, or by rollers worked by steam, water, or other mechanical power ;

Fustian-
 cutting
 works.

(8) "Fustian-cutting works," that is to say, any place in which persons work for hire in fustian cutting ;

Blast
 furnaces.

(9) "Blast furnaces," that is to say, any blast furnace or other furnace or premises in or on which the process of smelting or otherwise obtaining any metal from the ores is carried on ;

Copper
 mills.

(10) "Copper mills" ;

Iron mills.

(11) "Iron mills," that is to say, any mill, forge, or other premises in or on which any process is carried on for converting iron into malleable iron, steel, or tin plate, or for otherwise making or converting steel ;

Foundries.

(12) "Foundries," that is to say, iron foundries, copper foundries, brass foundries, and other premises or places in which the process of founding or casting any metal is carried on, except any premises or

places in which such process is carried on by not more than five persons and as subsidiary to the repair or completion of some other work ;

41 & 42
Vict. c. 16,
Sched. 4.

- (13) "Metal and india-rubber works," that is to say, any premises in which steam, water, or other mechanical power is used for moving machinery employed in the manufacture of machinery or in the manufacture of any article of metal not being machinery, or in the manufacture of india-rubber or gutta-percha, or of articles made wholly or partially of india-rubber or gutta-percha ; Metal and india-rubber works.
- (14) "Paper mills," that is to say, any premises in which the manufacture of paper is carried on ; Paper mills.
- (15) "Glass works," that is to say, any premises in which the manufacture of glass is carried on ; Glass works.
- (16) "Tobacco factories," that is to say, any premises in which the manufacture of tobacco is carried on ; Tobacco factories.
- (17) "Letter-press printing works," that is to say, any premises in which the process of letterpress printing is carried on ; Letter-press printing.
- (18) "Bookbinding works," that is to say, any premises in which the process of bookbinding is carried on ; Book-binding works.
- (19) "Flax scutch mills." Flax scutch mills.

PART TWO.

Non-Textile Factories and Workshops.

- (20) "Hat works," that is to say, any premises in which the manufacture of hats or any process incidental to their manufacture is carried on ; Hat works.
- (21) "Rope works," that is to say, any premises being a ropery, rope-walk, or rope work in which is carried on the laying or twisting or other process of preparing or finishing the lines, twines, cords, or ropes, and in which machinery moved by steam, Rope works.

41 & 42
 Vict. c. 16,
 Sched. 4.

- water, or other mechanical power is not used for drawing or spinning the fibres of flax, hemp, jute, or tow, and which has no internal communication with any buildings or premises joining or forming part of a textile factory, except such communication as is necessary for the transmission of power ;
- Bake-houses. (22) " Bakehouses," that is to say, any places in which are baked bread, biscuits, or confectionery from the baking or selling of which a profit is derived ;
- Lace ware-houses. (23) " Lace warehouses," that is to say, any premises, room, or place not included in bleaching and dyeing works as hereinbefore defined, in which persons are employed upon any manufacturing process or handicraft in relation to lace, subsequent to the making of lace upon a lace machine moved by steam, water, or other mechanical power ;
- Ship-building yards. (24) " Shipbuilding yards," that is to say, any premises in which any ships, boats, or vessels, used in navigation are made, finished, or repaired ;
- Quarries. (25) " Quarries," that is to say, any place not being a mine, in which persons work in getting slate, stone, coprolites, or other minerals ;
- Pit-banks. (26) " Pit-banks," that is to say, any place above ground adjacent to a shaft of a mine, in which place the employment of women is not regulated by the Coal Mines Regulation Act, 1872, or the Metalliferous Mines Regulation Act, 1872, whether such place does or does not form part of the mine within the meaning of those Acts.

35 & 36
 Vict. c. 76.
 35 & 36
 Vict. c. 77.

APPENDIX C.

THE DOCTRINE OF *RES IPSA LOQUITUR*.

THE question how far an accident is itself evidence of negligence frequently arises under the Employers' Liability Act, 1880, and is of great importance.

The answer to the question depends on the nature of the accident.

"In some cases, *res ipsa loquitur*, the accident may be of such a nature that negligence may be presumed from the mere occurrence of it. But when the balance is even, the onus is on the party who relies on the negligence of the other to turn the scale": Lord Esher, M. R. (a), quoting Lord Denman, speaking generally.

The mere happening of an accident is not sufficient evidence of negligence to be left to the jury; but the plaintiff must give some affirmative evidence of negligence on the part of the defendant (b).

But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care (c).

The following are the principal cases:—

NO EVIDENCE OF NEGLIGENCE.

1860, *Cotton v. Wood*, 8 C. B., N. S. 568; 29 L. J., C. P. 333.

In an action for negligent driving, the judge will not be justified in leaving the case to the jury when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant.

(a) 1872, *Hanson v. Lancashire & Yorkshire R. Co.*, 20 W. R. 297.

(b) 1862, *Hammack v. White*, 31 L. J., C. P. 129.

(c) 1865, *Scott v. London Dock Co.*, 3 H. & C. 596; 34 L. J., Ex. 220.

1862, *Hammack v. White*, 31 L. J., C. P. 129.

The mere happening of an accident is not sufficient evidence of negligence to be left to the jury; but the plaintiff must give some affirmative evidence of negligence on the part of the defendant.

1866, *Higgs v. Maynard*, 14 L. T., N. S. 332.

The plaintiff was employed by a firm occupying premises separated from the premises of the defendant by a passage. In this passage the plaintiff was at his usual work, when some glass fell into his eye from an upper window in the defendant's premises. The evidence proved that the window was broken by a ladder from the inside falling upon it, but failed to prove who caused its fall, or that it was caused by the defendant. The plaintiff was non-suited. Held, that the non-suit was right, as there was nothing to connect the defendant with the accident.

1869, *Moffatt v. Bateman*, L. R., 3 P. C. 115.

Action for negligence by the defendant in conveying the plaintiff, who was in his service, to perform for him certain work. The defendant drove, and while on the road the ringbolt of the carriage broke, the horses bolted, and the plaintiff was injured. Held, no evidence of negligence in defendant.

1869, *Welfare v. L. & B. R. Co.*, L. R., 4 Q. B. 693;
33 L. J., Q. B. 241.

In an action for negligence against a railway company, the plaintiff proved that he went to their station for the purpose of travelling by their railway, and made some inquiries respecting the departure of trains, and was directed by a porter of the defendants to look at a time-table suspended on a wall under a portico of the station. While there, a plank and a roll of zinc fell through a hole in the roof upon the plaintiff and injured him, and at the same time a man was seen on the roof of the portico. The judge non-suited the plaintiff. Held, that the non-suit was right.

Cockburn, C.J., said that it was the universal practice that in a great city persons do not employ their own

servants to do repairs to the roofs of their houses ; they employ a builder whose particular business it is to do it. Hence, there was nothing to connect the accident with the defendants.

1880, *Manzoni v. Douglas*, 6 Q. B. D. 145 ; 50 L. J., Q. B. 289.

A horse drawing a brougham suddenly and without any explainable cause bolted, and, notwithstanding the utmost efforts of the driver to control him, swerved on to the footway and injured the plaintiff. Held, no evidence of negligence to go to the jury.

1884, *Macfarlane v. Thompson*, 12 Sc. Sess. Cas. 4th Ser. 232.

Where the cause of the accident is not ascertained, the fact that it has taken place will not raise a presumption that it was caused by a defect in the machinery or plant for which the master was responsible.

EVIDENCE OF NEGLIGENCE.

1850, *Skinner v. L. B. & S. C. R. Co.*, 5 Ex. 787.

A train ran against another train standing in a station. Held, that the mere fact of the accident having occurred was *prima facie* evidence of negligence on the part of the defendants. See also *Carpue v. L. & B. R. Co.*, 5 Q. B. 751.

1863, *G. W. R. v. Braid*, 1 Moo. P. C., N. S. 101.

When an injury is alleged to have arisen from the improper construction or maintenance of a railway, the fact of one of its embankments giving way will amount to *prima facie* evidence of such insufficiency ; and this evidence may become conclusive, in the absence of any proof on the part of the company to rebut it.

1863, *Byrne v. Boadle*, 2 H. & C. 722 ; 33 L. J., Ex. 13.

The plaintiff was walking in a public street, past the defendant's shop, when a barrel of flour fell upon him from a window above the shop, and seriously injured him. Held, sufficient *prima facie* evidence of negligence for the jury to cast on the defendant the onus of proving that the accident was not caused by his negligence.

1865, *Scott v. London Dock Co.*, 3 H. & C. 596 ;
34 L. J., Ex. 220.

Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

1871, *Kearney v. L. B. & S. C. R. Co.*, L. R., 6 Q. B. 759 ;
40 L. J., Q. B. 285.

A brick fell from a bridge and injured the plaintiff, a train having passed just previously. On examination, other bricks were found to have fallen out. Held, sufficient evidence of negligence to go to the jury.

1882, *Walker v. Olsen*, 9 Sc. Sess. Cas. 4th Ser. 946.

A stevedore, while engaged in unloading a vessel, was injured by the tackling, with which the cargo was being raised, falling upon him. The tackling was supplied by the owner of the vessel. It was impossible to say exactly to what cause the falling of the tackling was attributable. Held, that the accident, along with the fact that there was no satisfactory explanation, was evidence that the tackling was defective, and the owner was liable.

Of the above, *Welfare v. L. & B. R. Co.* has always been considered an extreme case, but it can be defended on the ground mentioned by Cockburn, C.J.

Although, as we have seen, the happening of an accident may, in some cases, be *prima facie* evidence of negligence, it is not conclusive evidence thereof, and, notwithstanding such *prima facie* evidence, it is open to a jury to find a verdict for the defendants (*d*).

(*d*) 1858, *Bird v. G. N. R. Co.*, 28 L. J., Ex. 3.

APPENDIX D.

THE following Letter and Form appeared in *The Times* of November 29, 1897 :—

TO THE EDITOR OF "THE TIMES."

SIR,—So many inquiries have been made to this office as to the procedure under the contracting-out section of the Workmen's Compensation Act, 1897, that I am induced to ask you to allow me to publish a brief statement on the matter in your columns. Although the Act does not come into operation until July 1, 1898, we shall be prepared to receive applications for certificate on and after January 1 next, in order that the necessary preliminaries may be gone through in time to issue the certificates on or before July 1.

The Act requires as a condition precedent to the granting of a certificate by the Registrar that he should "take steps to ascertain the views of the employer and workmen." The first step appears to us to be that the employer and such of the workmen as join in the application should be asked to state their views in writing in a document accompanying the scheme. We have drawn up a form for this purpose, which I subjoin. The second step, that of ascertaining the views of the workmen who do not join in the application, will be taken afterwards.

The investigation that is to follow these preliminary steps will have, as it appears to us, to be directed to two points :—

1. Will the employer pay as much under the scheme as he would have to pay under the Act?
2. Will the workman derive as much benefit under the scheme as he would derive under the Act?

These questions depend to a large extent upon actuarial considerations; and we therefore suggest to the applicants for certificate to a scheme that they should have recourse to the advice of a competent actuary in framing its details.

I am, Sir, your obedient servant,

E. W. BRABROOK.

Registry of Friendly Societies, Central Office,
28, Abingdon Street, London, S.W., Nov. 27.

[Form of Application, &c.—See over.]

WORKMEN'S COMPENSATION ACT, 1897.

APPLICATION FOR CERTIFICATE TO SCHEME.

Title of Scheme ———.

Nature of Employment ———.

Situation of Works ———.

This application is made by the undersigned employer and ——— workmen.

The undersigned workmen have been authorized to join in it by ——— out of the total number of ——— workmen in the employment. [State how authority was given. The statement should be authenticated.]

The following is a comparison of the provisions of the scheme with those of the Act :—

	Scale of Compensation.	
	By Act.	By Scheme.
On death of a workman leaving dependants ..	£150 to £300, subject to the conditions mentioned in the Act.	
On death of a workman leaving no dependants.		
During incapacity for work after second week	Not exceeding 50 per cent. of earnings, and not exceeding £1 per week.	

The following are the benefits provided by the scheme other than those of the Act :—

The contribution of the employer to the scheme is to be ———.

The contribution of the workmen to the scheme is to be ———.

The scheme contains no obligation upon the workmen to join the scheme as a condition of their hiring.

The scheme has been actuarially [valued and] reported upon by Mr. ———, and a copy of his report is lodged herewith.

The views of the employer are as follow :—

(Signature) ———, Employer.

[Where more than one employer joins in the scheme, the form should be modified accordingly, and all should sign it.]

The views of the undersigned workmen are as follow :—

(Signatures) ——— } Workmen.
 ——— }
 ——— }

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